Before the
Federal Communications Commission
Washington, D.C.20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	WC Docket No. 03-109
Lifeline and Link-Up		

**COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES
IN RESPONSE TO AUGUST 3, 2011 FURTHER INQUIRY**

Dated: August 24, 2011

The Nebraska Rural Independent Companies

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SUMMARY OF COMMENTS

The Nebraska Companies submit these Comments in response to the August 3, 2011 "Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding" (the "*Further Inquiry*") issued in the above-referenced proceedings. As demonstrated herein, there is no sustainable basis for the adoption of the so-called "ABC Plan" filed by a number of interstate price cap-regulated entities (the "ABC Plan Filing Companies") nor, for that matter, the so-called "RLEC Plan" filed by various trade associations. And, for purposes of these Comments, since it would appear that the RLEC Plan proponents are silent and thus acquiesce to certain elements of the ABC Plan, the Nebraska Companies' amply supported criticisms of the ABC Plan apply equally to the RLEC Plan. (Since the Nebraska Companies have previously filed comments on the Further Inquiry-referenced State Joint Board Members Plan, the Nebraska Companies will rely on those comments.

As these Comments document, the collective result of the Industry Plans if adopted as filed would create "winners" and "losers" among carriers and customers, a result that is contrary to fair universal service policies that benefit the nation as a whole. For the Nebraska Companies alone, these Comments forecast that based on a reasonable interpretation of proposals and language in the Industry Plans, the Nebraska Companies collectively could ultimately experience a reduction of $50 million annually or even greater depending on the unknown impacts of the RLEC Plan's complicated USF redistribution proposal. This represents more than 40 percent of these companies' total regulated revenues that help support telecommunications infrastructure deployment in the rural areas that they serve.

The ABC Plan relies upon a computer model for the redistribution of $2.3 billion in federal Universal Service Fund support to price cap carriers under a right of first refusal, yet the model has not been made available for public evaluation. While the Nebraska Companies present what needs to occur in order to achieve legal compliance with the procedures under the Administrative Procedures Act as well as the Commission's February 2011 statements regarding the procedures for addressing models, any decision relying on the outputs of this model would be unlawful absent compliance with such procedures and allowing a minimum of 90 days to substantively comment on the model.

However, even if this problem is overcome, the ABC Plan still is unlawful. The extent of state preemption that the ABC Plan Filing Companies seek to have the Commission adopt cannot be justified. The ABC Plan Filing Companies' preemption theories run counter not only to the explicit retention of state commission authority enunciated in several provisions of the Communications Act of 1934, as amended, but also governing judicial pronouncements regarding the states' authority under it. Efforts to factually justify preemption (such as through the unsubstantiated, self-proclaimed contention that all Voice over Internet Protocol ("VOIP") is interstate traffic as of January 1, 2012) and claims that preemption must occur or federal policies will be frustrated are equally baseless. In short, the ABC Plan is an end run on the Commission's pronouncement that this proceeding should foster the long-standing federal-state partnership on universal service. As such, the ABC Plan should be rejected.

Likewise, the ABC Plan Filing Companies' proposed vague terms for the IP-IP interconnection scheme should be rejected. This aspect of the ABC Plan is also shown to be unlawful and otherwise irrational, presumably aimed at ignoring state commission authority over the existing Section 251/252 process approved by prior Commission decisions.

For a host of reasons stated in these Comments, the Nebraska Companies also demonstrate that rational public policy cannot and does not support the ABC Plan, and that adoption of the ABC Plan would not advance the Commission's enunciated universal service policies. The Nebraska Companies demonstrate that the ABC Plan and those supporting it only seek windfalls at the expense of rural consumers and rural carriers. Specifically, the ABC Plan would:

- Increase annual federal USF for price cap carriers by 275% annually for ten years but only require broadband speeds at 4 Mbps/768 kbps.
- Result in terminating intercarrier rate reductions to near-zero levels, a windfall of hundreds of millions of dollars to the nation's largest carriers, while also jeopardizing originating access as well as switched transport rates by eliminating lawful interconnection requirements.
- Ensure undeterred continuation of large revenue streams from special access, tandem and transit services.
- Enable price cap carriers to avoid serving their highest-cost customers by relegating those customers to satellite broadband service and by preempting state carrier of last resort requirements.

Ultimately, however, those that are harmed by the windfalls that the ABC Plan Filing Companies want to retain (and for that matter the support that the RLEC Plan entities' silence provides to the ABC Plan) are rural consumers and rural small businesses. These small businesses are the economic growth engines of rural America. The Nebraska Companies have a demonstrated commitment to serve rural America. Not unexpectedly, therefore, left unexplained by the ABC Plan is how the Commission could justify why nationwide universal service policies and mechanisms purposefully create carriers that are "winners" and consumers and carriers that are "losers" under such schemes included in the ABC Plan. There is no rational public policy basis for such result; the proponents of these Plans have provided none. Since the ABC Plan and the RLEC have been proposed as, effectively, an "all or nothing" deal, these Plans must be rejected. In doing so, the Nebraska Companies respectfully suggest that the Commission must move forward in this proceeding with lawful and policy-based reforms that are in the public interest and that treat all customers and carriers fairly.

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COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES IN RESPONSE TO AUGUST 3, 2011 FURTHER INQUIRY

I. INTRODUCTION

The Nebraska Rural Independent Companies ("Nebraska Companies"),[1] which provide telecommunications and broadband access services to some of the most-rural, sparsely populated parts of America, appreciate the opportunity to submit these Comments in response to the Further Inquiry issued by the Federal Communications Commission (the "Commission" or

[1] The Companies submitting these Comments are: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K. & M. Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom Inc., and Three River Telco.

"FCC").[2] In the *Further Inquiry*, the Commission seeks comments on various aspects of the submission made on July 29, 2011 entitled the "America's Broadband Connectivity Plan" (the "ABC Plan") as filed by representatives of six (6) interstate price cap companies -- AT&T, CenturyLink, FairPoint Communications, Frontier, Verizon and Windstream (the "ABC Plan Filing Companies"). According to the ABC Plan Filing Companies, the ABC Plan is a proposal "to reform the universal service and intercarrier compensation systems."[3] In addition, the *Further Inquiry* also seeks comments regarding a proposal by the State Members of the Federal-State Universal Service Joint Board (the "State Members Plan") and a proposal put forward by the Joint Rural Associations which the Commission refers to as the "RLEC Plan."[4] The ABC Plan and the RLEC Plan are collectively referred to in these Comments as the "Industry Plans."

II. BEFORE ADOPTING ANY PART OF THE ABC PLAN, THE COMMISSION MUST MAKE THE CQBAT MODEL AVAILABLE FOR PUBLIC INSPECTION AND ALLOW A REASONABLE COMMENT PERIOD.

A. The CQBAT Model Is Not in the Record and Was Not Meaningfully included in the Public Notice.

As indicated above, the ABC Plan was filed "to reform the universal service and intercarrier compensation systems."[5] Under the ABC plan, price cap carriers would receive $2.2

[2] *See*, Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, Public Notice, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, DA 11-1348, released August 3, 2011 (the "*Further Inquiry*").

[3] *See*, Letter from AT&T, CenturyLink, FairPoint Communications, Frontier, Verizon and Windstream to the Commission dated July 29, 2011(the "ABC Plan Cover Letter") at 1; *see also*, Attachments One through Five thereto.

[4] *See*, *Further Inquiry*, at 1, footnote 3. The Nebraska Companies will use this nomenclature in these Comments. However, as rural Local Exchange Carriers ("LECs") themselves, the Nebraska Companies do not agree with the RLEC Plan nor do they necessarily support the statements made by the Joint Rural Associations in the July 29, 2011, letter filed in the above-captioned proceeding by US Telecom and various parties (the "*US Telecom Letter*") regarding the ABC Plan.

[5] *See*, ABC Plan Cover Letter, at 1.

billion annually of federal high cost support, at least on a right of first refusal basis.[6] This amount is approximately $1.6 billion above the support level this class of companies received in 2010, an increase of 275%.[7]

As the Commission notes, the ABC Plan provides, among other things, for the use of a forward-looking cost model. The model is called the "CostQuest Broadband Analysis Tool" or "CQBAT Model." Attachments 2 and 3 to the ABC Plan contain a general description of the components of the CQBAT Model and some of the numerical parameters on which it and the ABC Plan generally are based.

The CQBAT Model is an integral component of the ABC Plan. Under the ABC Plan a price cap carrier's Connect America Fund ("CAF") support would be determined by comparing the cost of serving the COLR's service area against two standard figures. The first, called a "benchmark" would be set at $80 per line per month. If the CQBAT Model predicts costs below $80 per month, no support would be provided on the theory that this is a low-cost area. Similarly, the ABC Plan contains an "alternative technology threshold" cost value of $256 per line per month. Again, no support would be provided in areas with costs above this $256 limit.[8] These parameters were admittedly selected by the ABC Plan Filing Companies after receiving preliminary model results from CQBAT.

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[6] *See, e.g., Further Inquiry*, at 3; *see also* ABC Plan Cover Letter, at 2; ABC Plan, Attachment 1 at 2.

[7] *See In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 10-90, FCC 11-13, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, released February 9, 2011 ("*CAF NPRM*") at para. 20 (Figure 2).

[8] *See* ABC Plan, Attachment 1, at 5.

Three business days after the ABC Plan was filed, on August 3, 2011, the Commission issued a nineteen page document, the *Further Inquiry*, seeking comments regarding the ABC Plan as well as comments on the State Members Plan, and on the RLEC Plan brought forward by the Joint Rural Associations.[9] The *Further Inquiry* established August 24, 2011 as the deadline for comments, thus allowing parties only 21 days to prepare comments.

On August 12, 2011 the ABC Plan Filing Companies filed an ex parte letter providing some additional information about the CQBAT Model.[10] The first of two attachments lists the vendors and vintages for eight commercial data sets on which CQBAT relies. The underlying data sets themselves apparently have not been provided to the Commission.[11]

On August 16, 2011, the United States Telecom Association ("US Telecom"), on behalf of the ABC Plan Filing Companies, filed an ex parte letter providing some additional information on the CQBAT Model.[12] Attachment A to the filing contained a table that explains, among other things, that 728,202 residential and business locations in the country would be served by only satellite under the ABC Plan, including 77,648 business lines. Attachment A does not break the satellite locations down by state or by carrier study area. Attachment B to the letter is a table showing, by state, how the $2.2 billion for interstate price cap-regulated carriers would be distributed. According to the filing, $39.6 million of that amount will be distributed to

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[9] *See, Further Inquiry*, at 1, footnote 3.

[10] *See, Ex Parte* Letter, WC Docket No. 10-90, *et al.*, to Marlene H. Dortch from the ABC Plan Filing Companies, dated August 12, 2011 (the "*August 12th Ex Parte*").

[11] The *August 12th Ex Parte* also reports that the filing included Excel workbooks that "represent the inputs used when modeling the wireline network configuration for fiber to the DSLAM and a subscriber loop of up to 12,000 feet of copper." The *August 12th Ex Parte* does not state whether the Excel workbooks are confidential, but in any event they have not been made available to the public on the Commission's website. This filing was not made public until August 18, 2011.

[12] *See, Ex Parte* Letter, WC Docket No. 10-90, *et al.*, to Marlene H. Dortch from US Telecom, dated August 16, 2011.

price cap companies in Nebraska. However, the table does not show how existing support flows to those states would be reduced. Therefore, the table does not permit the reader to readily compare before and after support amounts.

On August 18, 2011, Windstream, one of the ABC Plan Filing Companies, filed with the Commission on behalf of the ABC Plan Filing Companies, an electronic spreadsheet and a "pdf" formatted facsimile which later became available on the Commission's website.[13] The spreadsheet shows data parameters used in the CQBAT Model. The spreadsheet contains dozens of tables, 162 separate pages of data, and thousands of data entries. It also has scores of abbreviations, only some of which are reasonably capable of being parsed by an informed observer.

In sum, to the knowledge of the Nebraska Companies, the Commission does not yet have the ability to acquire all the inputs to the CQBAT Model or to run the Model itself. Moreover, so far as the Nebraska Companies are aware, the ABC Plan Filing Companies have not yet provided the Commission or its Staff with the Model's detailed cost outputs by census block, upon which the ABC Plan itself was developed. Nor has that information been provided to the public.

B. The Administrative Procedures Act Requires Public Notice of the Details of the CQBAT Model.

Last February, the Commission assured the public that any cost model it developed would be fully available for public review. The Commission stated that it would:

> determine the amount of CAF support to be offered to the current COLR using a cost model developed in an open, deliberative, and transparent process with ample opportunity for interested parties to participate and verify model results. The amount of support offered would be determined by comparing the cost of serving

[13] *See*, *Ex Parte* Letter, WC Docket No. 10-90, *et al.*, to Marlene H. Dortch from the ABC Plan Filing Companies, dated August 18, 2011.

> the COLR's service area compared to a national cost benchmark. Support would be provided for costs above the benchmark. Total CAF support (assuming all COLRs accepted the ROFR) could be estimated by adjusting the benchmark.[14]

The Nebraska Companies have relied on this commitment; unquestionably, the CQBAT Model is a cost model, and it falls under the scope of this Commission commitment.

The Commission's statement is consistent with the requirements of the Administrative Procedures Act ("APA"). The APA provides that general notice of proposed rulemaking must be published in the Federal Register, unless actual notice is given to regulated entities.[15] Notice must include either the terms or substance of the rule or a description of the subject and issues.[16] The purpose of notice under the APA is to disclose the thinking of the agency and the data upon which it relied. Notice is adequate if "it affords interested parties a reasonable opportunity to participate in the rulemaking process."[17] At the very least, in the present circumstances the public in this informal rulemaking must receive a statement of the Commission's views "in a concrete and focused form so as to make criticism or formulation of alternatives possible."[18]

Technical data has a special role under the APA notice and comment requirements. Among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies in its rulemaking.[19] An agency commits serious procedural

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[14] *CAF NPRM*, at para. 432.

[15] *See,* APA, 5 U.S.C. § 553(b).

[16] *See,* APA 5 U.S.C. § 553(b)(3).

[17] *Amer. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C.Cir. 2008) ("*American Radio")*; *Amer. Med. Ass'n. v. Reno*, 57 F.3d 1129, 1132 (D.C.Cir. 1995); *Lloyd Noland Hosp. and Clinic,* 762 F.2d 1561, (11th Cir. 1985).

[18] *Prometheus Radio Project v. FCC*, 2011 WL 2653785, 11 (3rd Cir. July 7, 2011); *quoting from Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35-36 (D.C. Cir. 1977) *(emphasis added).*

[19] *See, American Radio, supra,* at 236.

error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

> In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.[20]

By requiring that the most critical factual material used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment. This comment process affords affected parties an opportunity to present evidence to support their positions, and thereby enhances the quality of judicial review. Public notice and comment regarding relied-upon technical analysis are the "safety valves in the [agency's] use of ... sophisticated methodology."[21]

The CQBAT Model inputs, functioning and outputs certainly qualify as technical data under this precedent as well as the Commission's statement quoted above from paragraph 432 of the *CAF NPRM*. The fact that the technical work on the ABC Plan has been done by the industry, not the Commission Staff, increases the importance of the notice requirement. When critical technical studies are performed by interested parties and not fully shared with the rulemaking agency, the need for clear and comprehensive public notice is even greater.

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[20] *Conn. Light and Power Co. v. Nuclear Regulatory Comm'n.*, 673 F.2d 525, 531 (D.C.Cir. 1982) (emphasis added); *cert. denied*,459 U.S. 835 (1982); *American Radio, supra, at* 236.

[21] *American Radio, supra,* at 236; *Sierra Club v. Costle,* 657 F.2d 298, 334, 397–98 & n. 484 (D.C.Cir.1981).

Otherwise, there is great risk that there will be one administrative record for the public and another for those "in the know,"[22] namely the ABC Plan Filing Companies.

Adequate time is also required to prepare comments. The CQBAT Model and its detailed outputs must be provided publicly so that interested parties have a meaningful opportunity to comment. Stated another way, the public must have "enough time with enough information to comment and for the agency to consider and respond to the comments."[23]

C. A Variety of Information is Needed to Evaluate the Model.

The *Further Inquiry* recognized the need for public access to the model and sought comment on what "information would need to be filed in the record regarding the CQBAT Model for the Commission to consider adopting it, as proposed in the ABC Plan."[24] The information that proponents have already provided, as described above, is only a small part of what interested parties need to evaluate the CQBAT Model and to determine whether the Commission is justified in relying on it. To properly evaluate the CQBAT Model, the Nebraska Companies request access to the following kinds of information.

First, the Nebraska Companies respectfully submit that more information is needed on the inputs.

1. The proponents should decode the abbreviations in the August 18 spreadsheets that list cost and other parameter information. For each input data element, there should be a brief statement describing how the model uses that element.

2. The public should be allowed access to the underlying commercially obtained input data described in the August 12 filing. The CQBAT Model relied on these commercial data sources, but the public currently has no way to evaluate the accuracy of that data or the reasonableness of having universal service support based on it, and no way to correct

[22] *See Home Box Office, Inc. v. FCC*, *supra*, at 54.

[23] *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009);

[24] *Further Inquiry*, at 3.

errors. Alternatively, state-specific files of inputs derived from these commercial sources should be provided.

The Nebraska Companies need this input information to verify the accuracy of the local data and the global parameters that the CQBAT Model developers used. Also, the input data files will make it possible to replicate the already-filed results.

Second, interested persons should be allowed to obtain a copy of the CQBAT Model computer program itself. The program should be installable on suitable and commonly available hardware such as standard personal computers. The CQBAT Model filing should include:

1. A description of minimum hardware and software resources needed to run the program.
2. Source code and all spreadsheets used in the CQBAT Model.
3. Installable and executable programs comprising the CQBAT Model.
4. An installation program, if necessary.
5. An instruction manual.

The Nebraska Companies and all interested parties need this modeling information to replicate and test the already-filed results. In addition, it allows the public to test the sensitivity of the model to various changes in its input parameters. Varying inputs is an important way to test of the validity of any model because unexpected insensitivity (or excess sensitivity) to input changes is an indication of likely programming errors.

Third, the Nebraska Companies respectfully request disclosure of the detailed outputs upon which the July 29 filing was built.

1. Outputs should be published at the level they were calculated, namely the census block level. The filing discussed four model "scenarios," using different parameters. All four result sets should be provided.

2. If intermediate results are produced by one part of the model and then used as input to another part, those results should be published as well.

The Nebraska Companies need this output information to evaluate the overall plausibility of the CQBAT Model results and to understand in more detail how the ABC Plan would affect rural areas with low densities and high costs.

The Nebraska Companies are particularly interested in understanding which census blocks in Nebraska have been determined to be ineligible for support because they are below the "benchmark" cost of $80 per line per month. Similarly, the Nebraska Companies are interested to learn which census blocks in Nebraska have been determined to be ineligible for support because they are above the "alternative technology threshold" cost value of $256 per line per month. Within their own service areas, the Nebraska Companies expect to compare the cost results against their own operating experience in providing wireline broadband services.

Further, the requested detailed output information is also needed to verify the accuracy of state-by-state support levels that were reported in Attachment B of the August 16 ex parte filing. Whether the ABC Plan manages to meet the requirements of Section 254 will depend heavily on the size and characteristics of these areas that would be ineligible for support.

Finally, the detailed output will assist the Nebraska Companies in determining the appropriateness of the proposed $1.6 billion support increase for price cap carriers. All interested parties and the Commission will need to determine whether this increase in support is sufficient under Section 254 or whether, as the work product of a select industry group that met in secret, provides more-than-sufficient support to that group, thereby harming other parts of the industry and the customers served.

The Nebraska Companies suggest that the Commission follow a process similar to that used for years 1997-2000 when designing the current "FCC Synthesis" cost model. The Commission could collect all input location-specific information pertaining to a single state in one or two files. Separate state-specific files could be prepared for each output scenario. All of those files could then be placed on a Commission web page. This process would allow any party that had installed the CQBAT Model on its own computer to run the CQBAT Model, one state at a time. To protect proprietary data, the web page could be password protected and parties would be granted access only if they register an intent to file comments and agree to use the data only for the purposes of filing comments in the Commission proceeding.

D. The Commission Cannot Adopt Any Part of the ABC Plan Without Fully Evaluating the CQBAT Model.

If the CQBAT Model is not reliable, the ABC Plan cannot provide the specific, predictable and sufficient support that the Communications Act of 1934, as amended (the "Act"), requires.[25] A model that inaccurately estimates costs will leave some high-cost areas without service and will provide more support in other areas than would be sufficient.

In addition, the CQBAT Model and the ABC Plan were developed in tandem. The central "benchmark" and "alternative technology threshold" parameters of the ABC Plan were admittedly selected after reviewing preliminary CQBAT Model results. It would make no sense to adopt the ABC Plan before knowing that the CQBAT Model is reliable.

While the CQBAT Model nominally applies only to price cap carriers, it undeniably has a direct effect on rate-of-return carriers. The ABC Plan proposes a "budget" of $2.2 billion of funding for price cap carriers,[26] and a total federal universal service fund ("USF") level of $4.5 billion.[27] Thus, any dollar amount given to price cap carriers is unavailable to other Eligible Telecommunications Carriers ("ETCs") (such as the Nebraska Companies). Moreover, since the

[25] *See*, 47 U.S.C. §§ 254(b)(5), (d), (e).

[26] *See*, ABC Plan Cover Letter at 2.

[27] *See*, ABC Plan, Attachment 2 at 1.

ABC Plan proponents have requested a substantial increase from current funding, the Nebraska Companies respectfully submit that it is in everyone's interest to determine whether that request is excessive or sufficient. Because of the cap on overall fund size, excessive funding for price cap carriers could translate directly into less support, and insufficient support, for rate-of-return carriers.

The Nebraska Companies respectfully submit that the proposed significant increase in federal USF dollars potentially available to the ABC Plan Filing Companies that filed the ABC Plan requires careful scrutiny, with effective assistance from the public. Not only the CQBAT Model, but all the premises of the ABC Plan, must be evaluated in the crucible of transparent and reasoned decision making coupled with meaningful public input.

E. Conclusion - Before Acting on the ABC Plan, the Commission Should Require Filing and Publication of the CQBAT Model, and It Should Allow Parties Sufficient Time To Evaluate The Model

The CQBAT Model is an integral component of the ABC Plan, and it is highly technical. Thus, the CQBAT Model and the actual inputs from it must be submitted on the record and subject to public comment before it can be relied upon by the Commission. Accordingly, the Nebraska Companies respectfully request the Commission to require the information described above in Section II.C, supra be submitted on the record and made available for access by all interested parties.

The Nebraska Companies also respectfully request that the Commission provides a sufficient amount of time to evaluate and make meaningful comment on the CQBAT Model, and submit that a minimum of ninety (90) days following release of the CQBAT Model information should appropriately be provided for analysis and provision of comments regarding the CQBAT Model.

The Nebraska Companies respectfully submit that the above requests are consistent with the Commission's desire, expressed last February, to adopt a model using an "open, deliberative, and transparent process with ample opportunity for interested parties to participate and verify model results."[28] The Nebraska Companies have relied upon this commitment. The above requests are also consistent with the letter and spirit of the APA and relevant case law.

III. EFFORTS BY THE ABC PLAN FILING COMPANIES AND OTHERS TO PREEMPT THE PROPER ROLE OF THE STATE COMMISSIONS OVER INTRASTATE INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE DIRECTIVES SHOULD BE REJECTED OUTRIGHT.

The Commission has stated its intent that this proceeding should bolster the federal-state partnership regarding universal service.

> The Commission also has recognized the important role of the states. Courts have also previously said that the Act "plainly contemplates a partnership between the federal and state governments to support universal service," and that "it is appropriate—even necessary—for the FCC to rely on state action."[29]

Likewise, the Commission confirmed that which the Nebraska Companies' experience demonstrates – that intercarrier compensation ("ICC") and universal service are intertwined and should be modernized using the same principles.[30]

Against this backdrop of the Commission encouraging a federal-state partnership, the ABC Plan Filing Companies suggest just the opposite. Specifically, the ABC Plan Filing Companies request that the Commission preempt: (1) state access rates by migrating all traffic to

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[28] *CAF NPRM*, at para. 432.

[29] *Id.*, at para. 85 *citing, Federal-State Joint Board on Universal Service*, *Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, 18 FCC Rcd 22559, 22568 para. 17 (2003) ("The Act makes clear that preserving and advancing universal service is a shared federal and state responsibility."), *quoting Qwest Corp. v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001); and *Qwest Communications Int'l Inc. v. FCC*, 398 F.3d 1222, 1232 (10th Cir. 2005).

[30] *Id.,* at para. 490.

some form of reciprocal compensation under Section 251(b)(5); (2) state authority to set the rates for reciprocal compensation under Section 252(d) through the establishment by the Commission of a default reciprocal compensation rate of $0.0007; and (3) state authority over traffic that is identified as originating and terminating within a state, such as fixed Voice over Internet Protocol ("VoIP") traffic.[31] In addition, the ABC Plan also attempts to preempt state commission authority in the Eligible Telecommunications Carrier ("ETC") designation process and, from a practical perspective, Carrier of Last Resort ("COLR") requirements.[32]

For the reasons stated herein, the Nebraska Companies respectfully urge the Commission to reject the ABC Plan Filing Companies' request to preempt state authority. The ABC Plan Filing Companies have provided no sustainable basis for the preemptions that they seek. Rather, by abandoning the Commission's efforts to create constructive actions with the state commissions to address ICC and universal service,[33] the ABC Plan Filing Companies distort both fact and law in an effort to manufacture a legal basis for what is in reality a self-serving ICC and universal service framework.[34] Thus, the preemption that the ABC Plan seeks to establish should be rejected.

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[31]*See*, ABC Plan, Attachment 1, at 10-11, 13; *see also id*., Attachment 5, at 1-4, 9-37.

[32]*See generally,* ABC Plan, Attachment 1, at 13.

[33] The Nebraska Companies have urged the Commission to adopt constructive and legally sustainable incentives to address ICC and state universal service issues. *See* Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90 *et al*., filed April 18, 2011 at 34-43. The Nebraska Companies specifically incorporate this portion of the comments herein by reference.

[34] Since various formulations of the types of preemption theories being proffered by the ABC Filing Companies have been addressed and demonstrated to be without merit, the Nebraska Companies incorporate those submissions herein by reference. *See, e.g.*, Comments of the State Joint Board Members, WC Docket No. 10-90, *et al*., filed May 2, 2011 at 143-145; Comments of NASUCA, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 93-95; Comments of NARUC, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 9-13; Comments of the Regulatory Commission of Alaska, WC Docket No. 10-90, *et al.,* filed April 18, 2011 at 9; Comments of the

A. The ABC Plan Filing Companies Seek to Re-Write Applicable Legal Standards Regarding Preemption.

The ABC Plan suggestions regarding preemption re-write applicable legal principles regarding federal agency preemption. However, self-created ambiguities within the statute or alleged facts are no basis for preemption, let alone rewriting the Act.

The ABC Plan Filing Companies cannot side step the general legal propositions that preemption is something that is "not likely to be presumed"[35] and is not lightly found.[36] This situation is particularly true where, as here, there exists explicit reservation of state commission authority within the Act. The ABC Plan Filing Companies cannot justify their efforts to preempt

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California Public Utilities Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 19; Comments of the Public Service Commission of the District of Columbia, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 2; Comments of the Kansas Corporation Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 11; Comments of the Indiana Regulatory Utility Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 11; Initial Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 05-337, *et al.*, filed Nov. 26, 2008; and Comments of National Cooperative Telecommunications Association, WC Docket No. 05-337, *et al.*, filed Nov. 26, 2008. Moreover, the Nebraska Companies note that the preemption issues have not been addressed by the Commission, and reliance on the record already amassed in response to the *CAF NPRM* and prior efforts concerning ICC reform in WC Docket 05-337regarding these issues is entirely appropriate. This is particularly true since the ABC Plan includes a 68 page attachment that allegedly provides the legal basis for the preemption that underlies the ABC Plan (*see* ABC Plan, Attachment 5) and the 21 days provided by the Commission for comment on the *entirety* of the ABC Plan. *See generally, Further Inquiry*.

[35] *Greater Washington Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1320 (D.C. Cir. 1991); *see also Missouri Bd. of Examiners for Hearing Instrument Specialists v. Hearing Help Exp., Inc.*, 447 F.3d 1033, 1035 (8th Cir. 2006) *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-19, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Qwest Corp. v. Scott*, 380 F.3d 367, 374 (8th Cir. 2004) *quoting Calif. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987).

[36] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991). When determining whether federal preemption exists, the "ultimate touchstone" inquiry is whether Congress intended the federal regulation to supersede state law. *Altria Group, Inc. v. Good*, -- U.S. --, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008); *Gabarick, et al. v. Laurin Maritime (America) Inc., et al.*, 623 F.Supp.2d 741, 749-50 (E.D.La.2009) (slip copy); *Brodie v. Telecorp Communications, Inc.*, 836 So.2d 646 (5th Cir.2002).

in light of the Supreme Court's decision in Louisiana PSC v. FCC that a federal agency cannot expand its own power, even if the purpose is to effectuate desirable policy.

> [A] federal agency may pre-empt State law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace State law is to examine the nature and scope of the authority granted by Congress to the agency. . . . Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.[37]

In *AT&T v. Iowa Utilities Board*, the Supreme Court limited the general notion of a presumption against preemption in light of the 1996 revisions to the Act.[38] That discussion, however, addressed only local competition issues under the Act. It did not address whether the Act preserved state ratemaking authority over intercarrier access rates, the role of states in administering ETCs under Section 214(e), or Section 254 universal service provisions.

Based on these standards, the ABC Plan Filing Companies cannot sustain the preemption they seek. As demonstrated herein, the ABC Plan Filing Companies' legal theories are suspect and not sustainable and should be rejected outright.

B. Rate Preemption cannot be Reconciled with Explicit Statutes that Preserve State Commission Authority.

The sheer volume of words in Attachment 5 of the ABC Plan cannot supplant the fact that the ABC Plan Filing Companies cannot reconcile, and have not reconciled, the preemption they seek with the explicit retention of state authority under the Act, including the state commission authority over exchange access under the 1996 revisions to the Act.

[37] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75, 106 S.Ct. 1890, 1901-02 (1986).

[38] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378, 119 S.Ct. 721, 730, n.6 (1999).

The ABC Plan Filing Companies improperly look past the over-arching provision of the Act that for decades has limited the Commission's authority. Section 152(b) of the Act states:

> Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 and Title VI, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .[39]

The ABC Plan Filing Companies have not identified any provision of the Act that supersedes this general retention of the state's jurisdiction over intrastate communications.

Should any doubt remain, it is dispelled by Section 601 of the Act. Congress explicitly stated that the neither the 1934 Communications Act nor the Telecommunications Act of 1996 shall "be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[40]

Third, Section 252(e)(3) of the Act explicitly allows state commissions, notwithstanding other statutory provisions, to enforce "other requirements of State law in its review of an [interconnection] agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."[41] Interpreting the statute in the manner proposed by the ABC Plan Filing Companies would make this provision of the 1996 revisions to the Act a nullity. If all switched interconnection is interstate, there would be no basis to impose "other requirements of state law," including service quality requirements.

[39] 47 U.S.C. §152(b)(1) (emphasis added).

[40] 47 U.S.C. § 152 (Section 601 Applicability of Consent Decrees and Other Law).

[41] *See*, 47 U.S.C. §252(e)(3).

Fourth, the ABC Plan Filing Companies rely on Section 201 of the Act under the general rulemaking provisions of the Commission.[42] That analysis cannot be reconciled with Section 251(d)(3) which specifically retains state jurisdiction over intrastate exchange access.

> (3) PRESERVATION OF STATE ACCESS REGULATIONS- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[43]

These four explicit provisions retaining state commission authority cannot simply be brushed aside. The ABC Plan Filing Companies have not provided sufficient basis to justify the preemption they seek.

Reliance on Section 251(g) by the ABC Plan Filing Companies does not alter the conclusion that the overly broad preemption that the ABC Plan seeks is erroneous. The ABC Plan Filing Companies essentially contend that Section 251(g) is an open-ended mechanism allowing the Commission at any time to preempt state commission authority over intrastate exchange access rates, terms and conditions.[44] This interpretation flies in the face of the above statutory reservations of state commission authority over intrastate access. The argument also expands the scope of Section 251(g) far beyond its obvious and limited purpose.

Section 251(g) addresses the preservation of existing rules for intercarrier relations. The status quo had been established by a variety of rules, orders, and consent decrees. The main purpose of Section 251(g) is to maintain the status quo for those legal obligations, which might otherwise have dissolved under the earlier subsections of Section 251. The statute expressly

[42] *See, e.g.,* ABC Plan, Attachment 5 at 9.

[43] 47 U.S.C. § 251(d)(3).

[44] *See, e.g.,* ABC Plan, Attachment 5, at 9, 11.

mentions "equal access," an obligation the Commission had imposed over a decade earlier on local exchange carriers in order to promote the Interexchange Carrier ("IXC") industry. The legislative history shows that the chief purpose of Section 251(g) was to hold in place (at least temporarily) the effects of two consent decrees, one involving the Bell Operating Companies and one involving GTE.[45] Rather than holding the status quo in place forever, Congress also gave the Commission authority to relax some or all of those same requirements. So, for example, the Commission could clearly act to dissolve existing federally imposed "equal access" obligations that require local exchange carriers to provide "1-plus" dialing to IXCs. It might also have been able to dissolve other restrictions arising from BOC or GTE consent decrees.

The ABC Plan Filing Companies, however, would improperly extend this interpretation in at least three ways. First, the ABC Plan Filing Companies' arguments improperly broaden the scope of the statute to intrastate access regulations. Their argument necessarily is that Congress believed that intrastate exchange access regulations were somehow jeopardized by the Act so Section 251(g) was needed to preserve the status quo. This argument is incorrect. Since the 1996 revisions to the Act clearly did not preempt state interexchange access regulations as reflected in the explicit language of Section 251(d)(3), there is no reason to conclude that Section 251(g) was ever intended by Congress to apply to access obligations applicable to intrastate traffic, imposed under color of state law, and not preempted by Section 251. Those regulations proceeded originally from the police power of the states. The Act adopted in 1934 did not grant

[45]*See*, S. CONF. REP. 104-230, at 123 ("Because the new approach completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place. By the same token, although not specifically addressed in either the Senate bill or the House amendment, some provision is also needed to ensure that the GTE Operating Companies that provide local exchange services continue to provide equal access and nondiscrimination to interexchange carriers and information service providers. Accordingly, the conference agreement includes a new section 251(g)."); *accord*, H.R. CONF. REP. 104-458 at 123.

states those powers; state legislatures granted those powers to their respective state commissions or regulatory bodies. Instead, the Act adopted in 1934 merely recognized that those powers continued to exist.[46] Similarly in 1996, Section 251(g) was drafted on the assumption that state authority over intrastate access arose from an independent source and was not jeopardized in any way by the 1996 revisions to the then existing Act. If Section 251(g) was not intended even to apply to intrastate access in 1996, it cannot provide a jurisdictional basis to preempt intrastate access today.

Second, the ABC Plan Filing Companies' argument cannot be reconciled with Section 251(d)(3) of the Act. If the legislative history leaves any residual doubt about the continuing validity of intrastate access regulations, Section 251(d)(3) dispels that doubt. The Commission has no power under Section 251 (or any part of Section 251) to preclude state enforcement of intrastate access obligations.[47]

Third, the ABC Plan Filing Companies' argument ignores the temporary nature of the Commission's authority under Section 251. As the State Joint Board Members have noted,[48]Section 251(d)(1) of the Act required the Commission to implement all actions to implement Section 251 before the end of 1996.[49] Section 251(g) has already been completely

[46]*See*, 47 U.S.C. § 152(b).

[47] The statute contains a limited exception not applicable here where a state access regulation substantially prevents the implementation of Section 251. So long as state access regulations apply only to interexchange traffic, the exception does not apply.

[48]*See*, Comments of State Joint Board Members, WC Docket No. 10-90, *et al.*, filed May 2, 2011 at 144.

[49] Congress knew how to differentiate between the words "subsection" and "section." The requirement in Section 251(d)(1) that the Commission complete "*all* actions necessary to establish regulations to implement the requirements *of this section*" clearly referred to the entirety of the section 251. *Compare* 47 U.S.C. § 251(c) ("In addition to the duties contained in *subsection (b)*….) (emphasis added).

fulfilled through the initial Commission rules preserving state commission authority regarding intrastate exchange access rates, terms and conditions.

Finally, the ABC Plan Filing Companies cannot rely upon Section 251(b)(5) to bolster their Section 251(g) claims. This argument relies upon a muddying of two traditionally distinct concepts recognized in the Act. “Exchange access” is the LEC-provided input for telephone toll service.[50] Telephone toll service, often called “long distance service,” is provided across exchange areas[51] and is provided by IXCs. IXCs pay originating access for the use of the operating LEC’s facilities and pay terminating access for the use of the terminating LEC’s facilities.

Section 251(b)(5) addresses reciprocal compensation. Reciprocal compensation is inapplicable to toll traffic because toll traffic is originated by a third party, the IXC, which is the service provider of the toll call. The Commission’s rules make clear that reciprocal compensation applies only when each party is asked to terminate traffic originated by the other party.

> (e) Reciprocal compensation. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.[52]

This same concept is also embodied in the Section 251(b)(5) pricing requirements of the Act under Section 252(d)(2)(A)(i) which provides for the “mutual and reciprocal recovery by each

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[50] *See*, 47 U.S.C. § 153(16).

[51] *See*, 47 U.S.C. § 153(48).

[52] 47 C.F.R. § 51.701(e) (emphasis added).

carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. . . ."[53]

The ABC Plan Filing Companies cannot rely on Section 251(b)(5), coupled with Section 251(g), to circumvent the Commission's long-standing and proper interpretation of this functional difference between reciprocal compensation and exchange access.[54] The statute that covers reciprocal compensation clearly does not apply to exchange access. Therefore, the reciprocal compensation statute affords no authority to preempt intrastate access rates. Efforts to abolish this long-established distinction between access and reciprocal compensation cannot be justified.[55]

C. The Commission does not have Authority to Set a "Default Rate" as the ABC Plan Proposes.

The Commission does not have authority to set a non-compensatory default rate of $0.0007 for all traffic, regardless of jurisdiction. The ABC Plan Filing Companies contend that because some parties have agreed to exchange traffic at the rate of $0.0007, such a rate would be just and reasonable across the industry.[56] Undoubtedly this is one of many rates established after interconnection negotiations. There is no basis in law, however, to extrapolate rates derived

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[53] 47 U.S.C. §252(d)(2)(A)(i).

[54] Similarly, claims that non-ILEC traffic can be defined by the Commission as wholly within the Section 251(b)(5) (*see, e.g.*,, ABC Plan, Attachment 5 at 13-14) is without merit. Section 251(d)(3) allows state commissions to establish "access and interconnection obligations of local exchange carriers" regardless of whether that local exchange carrier is also an ILEC. 47 U.S.C. § 251(d)(3)(A).

[55] The Nebraska Companies also note that, for wireline services, the Commission has left it to the state to determine what is and is considered to be local areas for purposes of applying reciprocal compensation arrangements, stating "[t]raffic originating or terminating outside of the applicable local area would be subject to interstate *and intrastate access charges*." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 98-96, 11 FCC Rcd 15499 (1996) ("*First Report and Order*") at para. 1035.

[56] *See, e.g.*, ABC Plan, Attachment 5, at 3-4, 34-36.

from bilateral contract negotiations or arbitrations into a "default rate" for the entire industry. The proponents have not even explained whether this rate is widely adopted, or the circumstances and frequency with which other rates have been adopted. Moreover, the existence of a rate in some interconnection agreements cannot supplant the specific requirements of 47 U.S.C. § 252(d)(2) that reciprocal compensation rates should be cost-based.

The ABC Plan Filing Companies characterize their recommended rate of $0.0007 as a "default rate" and as a "methodology"[57] that is consistent with the Commission's authority under Section 252 of the Act and the Supreme Court's decision in *AT&T v. Iowa Utilities Board*.[58] The proponents misread the plain meaning of the statute and the case law.

First, the ABC Plan does not truly propose a "default" rate. The proposal is to establish a so-called "uniform maximum federal rate."[59] The proponents have tried to dress up this proposal by stating that parties "can enter into negotiated arrangements that depart from the default rates."[60] In reality, the ABC Plan calls for a maximum rate of $0.0007 and parties would only be free to negotiate a lower rate. The ABC Plan would effectively set the rate, plain and simple. Section 251(b)(5) of the Act does not allow the Commission to act in this way. The ABC proposal is akin to setting a proxy rate, which the courts have held to be beyond the Commission's authority.[61]

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[57] *See, e.g., id.*, at 2.

[58] *AT&T v. Iowa Utilities Board, supra*, at 380-381.

[59] *See*, ABC Plan, Attachment 5, at 16-17 (The FCC can set a maximum federal default rate.).

[60] *See*, ABC Plan, at 11.

[61] *See*, *Iowa Utilities Board v. FCC*, 219 F.3d 744, 757 (8th Cir. 2007)("*IUB-II*")(Commission efforts to establish proxy pricing rules vacated); *see also*, Section XV Reply Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 11-13.

Second, the Commission cannot mandate a so-called "methodology" that prohibits consideration, on a case-by-case basis, of transport and termination costs or produces rate outcomes that arbitrarily move cost recovery to other services. The statutory pricing criterion under Section 252(d)(2) is that rates must reflect the "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[62] The Commission cannot adopt a so-called "methodology" that directly violates this minimum statutory requirement. Therefore, the ABC Plan does not propose a "methodology" that is allowed under the Supreme Court decision. Just as the Eighth Circuit Court of Appeals in *IUB-II* rejected a similar notion,[63] the Commission should reject the ABC Plan here. Nor can the ABC Plan lawfully propose (or the Commission adopt) a purported methodology that effectively prescribes a rate. That result, if it should occur, would end-run the specific directives of the Supreme Court in *AT&T v. Iowa Utilities Board* as well as *IUB-II*.[64]

Third, the ABC Plan's so-called methodology improperly preempts state authority. Calling $0.0007 a "methodology" for state action does not make it so. If it is anything of the kind, it is a methodology to deprive the states of their Section 252 authority. Subject to proper procedures and input by parties, Section 201 may provide the Commission the authority to establish a range of methodologies for rates under Section 201. However, the Commission does not have jurisdiction to set a methodology that prohibits state commissions from hearing evidence and making decision about how to execute their statutory duties under Section 252.[65]

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[62] 47 U.S.C. § 252(d)(2)(A)(i).

[63] *IUB-II*, *supra*, at 757.

[64] The Commission's adoption of the TELRIC standard, for example, did not run afoul of such directives because, when applied, the TELRIC methodology results in different rates based on the ILEC that is being examined.

[65] *IUB-II*, *supra*, at 757.

That is exactly what the ABC Plan proposes here, something the ABC proponents virtually acknowledge.[66]

The ABC Plan Filing Companies argue that the "outer limit" of the Commission's authority under Section 201(b) goes beyond setting a methodology.[67] They are wrong. The ABC Plan certainly goes beyond all permissible outer limits, and the Commission should reject the argument. The Supreme Court explained that:

> The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[68]

The 8th Circuit followed the same principle in IUB-II.[69] The crux of the problem is that the ABC Plan Filing Companies want the Commission to disregard the fact that the ABC Plan does not allow state commissions to perform this role.

D. Claims That VoIP Traffic is Inseverable Have Already Been Rejected and are Otherwise Inconsistent with the ABC Plan Itself.

The ABC Plan Filing Companies' assert that the inseverability of VoIP and other traffic justifies preempting state commission authority over intrastate access rates. This argument is without merit.[70] Equally without merit is the contention that the Commission has already blessed the notion that if tracking and identification of traffic is too costly, it should not be imposed.[71]

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[66] *See*, ABC Plan, Attachment 5, at 16-17 (FCC "could adopt a 'methodology' that caps reciprocal compensation rates at the uniform federal default rate".).

[67] *See*, ABC Plan, Attachment 5 at 16-17.

[68] *AT&T v. Iowa Utilities Board, supra*, at 384 (emphasis added).

[69] *See*, *IUB-II, supra.* at 757.

[70] *See, e.g.*, ABC Plan, Attachment 5, at 18-26.

[71] *See, id*., at 19.

The Commission has already determined in many contexts that it is possible to separate traffic, including VoIP traffic. Indeed, many Commission regulatory mechanisms depend on this separation.

The Commission requires 911 services to be provided by interconnected VoIP service providers. To be effective, 911 services must know the "Registered Location" of the end user who places the call.[72] Thus, it is possible to determine the jurisdiction of a call.

Second, jurisdictional traffic separation is performed for universal service contribution purposes. USF contributions require parties to distinguish between traffic that is subject to federal contribution requirements and traffic that is not. Wireless providers as well as VoIP providers today may provide traffic studies in an effort to opt out of applicable federal USF "safe harbor" contribution percentages[73] and the Nebraska Companies understand that some providers may actually provide traffic studies to justify opting out of the safe harbor level. Those studies would be impossible if the carriers could not identify the jurisdiction of individual calls.

The Commission recently made clear that the geographic location of fixed VoIP end users can be readily ascertained since "the Commission has shown that it is possible to separate the interstate and intrastate revenues of interconnected VoIP providers for purposes of

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[72] *See*, 47 C.F.R. §§ 9.5(b)(2) and (d), 9.3 (Definition of "Registered Location").

[73] *See, e.g.*, 2011 Telecommunications Reporting Worksheet Instructions, Form 499-A at 23 and n. 44. In the context of interconnected VoIP, the FCC has already determined that, when establishing the VoIP safe harbor percentages, the record before it demonstrated that "traffic studies are a feasible option for providers of interconnected VoIP" and further noted the new requirements that wireless providers submit their traffic studies to the Commission and USAC for approval. *In the Matter of Universal Contributions Methodology, et al., Report and Order and Notice of Proposed Rulemaking*, WC Docket No. 06-122, CC Docket No. 96-45, CC Docket No. 98-171, CC Docket No. 90-571, CC Docket No. 92-237 and NSD File No. L-00-72, CC Docket No. 99-200, CC Docket No. 95-116, CC Docket No. 98-170 and WC Docket No. 04-36, FCC 06-94, released June 27, 2006 at para. 57 (citation omitted); *see also id.* at para 9 *citing In the Matter of Federal-State Joint Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 13 FCC Rcd 21252, 21257 (para. 11).

calculating universal service contributions."[74] Thus, any contentions that it is impossible to identify traffic and thus measure and jurisdictionalize it between the state and interstate jurisdictions should be rejected.

As the Commission's rules indicate, carriers subject to the CALEA requirements (including wireline carrier, interconnected VoIP providers, cellular and PCS carriers) are required to certify that they have maintained "secure and accurate" records of call intercept or access to "call-identifying information."[75] This certification "must include, at a minimum" the "telephone number(s) and/or circuit identification numbers involved" among other items.[76] Other additional assistance capability requirements must be provided by wireline, cellular and PCS telecommunications carriers that are subject to industry standards related to, by way of example only, call-identifying information and in-band and out-of-band signaling.[77] Thus, compliance by the subject entities with these requirements is otherwise required by law today.

Finally, 47 U.S.C. § 258(a) preserves the right of states to enforce toll presubscription rules regarding intrastate traffic. The toll presubscription system was established with the concept that intrastate toll and interstate toll are distinct services. If it were impossible to separate intrastate from interstate toll, existing presubscription systems would also be impossible.

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[74]*See, In the Matter of Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, Declaratory Ruling, WC Docket No. 06-122, FCC 10-185, released November 5, 2010 at para.15.

[75] 47 C.F.R. § 1.20004(a).

[76] 47 C.F.R. §1.20004(a)(i); *see also,* 47 C.F.R. §§1.20004(a)(ii) to (iv).

[77]*See generally,* 47 C.F.R. § 1.20007.

The ABC Plan Filing Companies also argue that even if it is possible to separate traffic jurisdictionally, preemption is justified because there is no "practical or economic" reason to separate the traffic.[78] The argument relies chiefly on *California v. FCC*.[79] The Commission should reject this argument which, at best, relies on an overly broad reading of that 1994 decision of the 9th Circuit.

California v. FCC involved "enhanced services" that were offered on an interstate and interstate basis. The Commission preempted state regulations requiring separate facilities and personnel for the intrastate portion of such enhanced services. The Commission determined that it would not be economically feasible for the BOCs to offer the interstate portion of such services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion. The court upheld the preemption on the ground that it was narrowly tailored to avoid the foreseeable harm that enhanced services would not otherwise have been available on an integrated basis.[80]

California v. FCC is not controlling in this context. The states are not imposing a new structural separation requirement that creates additional costs on carriers seeking to offer new services. Instead, the ABC Plan proposes broad preemption of longstanding state ratemaking activities that have existed since the early 1980s when "access charges" were first implemented. States are not extending their jurisdiction over intrastate access charges beyond that which has existed for almost thirty years. Moreover, both intrastate and interstate traffic are already being provided by the same entity over the same network; and that network and the services provided through its use have always been subject to joint regulation by state commission and the

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[78]*See, e.g.,* ABC Plan, Attachment 5, at 19.

[79]*California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

[80]*Id.* at 932.

Commission. As a result, the ABC Plan Filing Companies have not shown that the fundamental facts have changed regarding the burden of identifying traffic as intrastate or interstate. The ABC Plan demonstrates that the ABC Plan Filing Companies would rather not bother to identify the traffic, but not that the cost is unreasonable. Indeed, their argument seems to be that because the "landscape has changed" since 1996,[81] any cost imposed to jurisdictionally identify traffic should be preempted.

Even if the Commission were to conclude that *California v. FCC* applies here, preemption is not justified. What is being addressed here is the application of jurisdiction over ICC and the historical fact that there has been and is one network for multiple services and multiple jurisdictions. Thus, proper application of ICC mechanisms, coupled with the adverse impact on revenues that support universal service, require traffic to be properly identified and jurisdictionalized. *California v. FCC* does, however, stand for the proposition that any Commission preemption must be narrowly tailored,[82] and the ABC Plan fails that test.

The ABC Plan Filing Companies also rely on *NCUC v. FCC*.[83] In that case the Commission had previously ruled that customers could use their own telephone equipment for interstate calls. The state, however, did not allow that option. The state regulations would have effectively negated the Commission's regulation authorizing the use of customer provided equipment for interstate services. Reliance on *NCUC v. FCC* by the ABC Plan Filing Companies is misplaced. As before, any difference between how a state commission has determined its pricing policies and rate setting and that used by the Commission has existed far before the purported controversy being proffered by the ABC Plan Filing Companies. If the

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[81] ABC Plan, Attachment 5, at 21.

[82] *California v. FCC, supra,* at 932.

[83] *See,* ABC Plan, Attachment 5, at 20 *citing NCUC v. FCC*, 537 F. 2d. 787 (4th Cir. 1976).

policy that is allegedly being negated by current ICC rate differences between the states and the Commission is the deployment of broadband, that policy has only been negated by the lack of monies being dedicated by the ABC Plan Filing Companies to deploy broadband in the rural areas they serve. The rural ILECs' broadband in their rural areas has not suffered by differing intrastate versus interstate ICC rates.

The ABC Plan Filing Companies also argue that all traffic has become "inseverable" because consumers have begun purchasing new kinds of service plans.[84] This argument is essentially that carriers can change jurisdictional requirements by changing the nature of their retail offerings. The Commission should reject the argument. How a consumer pays the carrier, whether in bundles or by the minute, has no bearing on the end points of that call or on the jurisdiction of that call. So long as end points can reasonably be determined, it is possible to classify whether the call is intrastate or interstate, and to determine the appropriate rate. The jurisdiction of traffic has been and can continue to be determined by the industry based on the "to" and "from" numbers or factors, and the Commission has acknowledged this fact.[85]

Similarly, the ABC Plan Filing Companies argue that many calls are "intended to transcend legacy geographic and service distinctions."[86] It is not clear whether this argument

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[84]*See,* ABC Plan, Attachment 1, at 2-3.

[85]*See, In the Matter of the Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, *Declaratory Ruling and Report and Order*, FCC 06-79 (rel. June 30, 2006) at para. 32 & n.89 and 90. *citing In the Matter of Developing a Unified Intercarrier Compensation Regime*, *Further Notice of Proposed Rulemaking*, CC Docket No. 01-92, 20 F.C.C.R. 4685 (2005) (the "*Intercarrier Compensation FNPRM*"); *see also Intercarrier Compensation FNPRM* at para. 22 & n.59. ("Telecommunications carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call, which may be relevant for jurisdiction and compensation purposes.") (citing *Starpower Communications, LLC v. Verizon South Inc.*, EB-00-MD-19, *Memorandum Opinion and Order*, 18 F.C.C.R. 23625, 23633, para. 17 (2003)); *see also,* Section XV Reply Comments of the Nebraska Companies, WC Docket No. 10-90 *et al.,* filed April 18, 2011 ("Nebraska Section XV Replies") at 8.

[86] ABC Plan, Attachment 1, at 3 (emphasis in original).

presumes to know the intention of the customer who buys the service or the intention of the carrier that offers it. In either case the argument fails. Neither a customer nor a carrier can change the jurisdiction of a call by "intending" that it be something other than what it is. Again, so long as end points can reasonably be determined, it is possible to classify whether the call is intrastate or interstate, and to determine the appropriate rate.

Incredibly, the ABC Plan Filing Companies argue for preemption on the ground that new providers "have no business incentive to invest in the capabilities to align these new services with legacy jurisdictional distinctions."[87] The argument essentially is that state jurisdiction should be preempted because carriers see no business reason to comply with it. It should go without saying that many regulated entities are required to comply with requirements that do not provide them with immediate commercial advantages.[88] However, that "inconvenience" does not negate the existence of and need for such regulatory requirements.

Finally, the ABC Plan itself contradicts its claims regarding inseverability. The ABC Plan proposes to rely on "call detail" to determine the ICC treatment for VoIP traffic.[89] Call detail would likely include at least the "to" and "from" numbers for a call. If that detail is so unreliable, or if there is no "economic or practical" reason for entities to provide it,[90] or if there is no "business incentive" to provide it,[91] it is difficult to understand how it could be included in the ABC Plan at all.

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[87] *Id.*

[88] *See*, ABC Plan, Attachment 1, at 10. The "business incentives" referenced by the ABC Plan Filing Companies could possibly explain why the ABC Plan does not include any specific proposals to address the misidentification or non-identification of traffic being terminated on the PSTN.

[89] *See, id.*

[90] *See, e.g.*, ABC Plan, Attachment 5, at 19.

[91] *Id.*, at 3.

E. Neither the Law Nor the Record Support Preemption Based On Frustration of Federal Goals.

The ABC Plan Filing Companies make broad assertions that preemption is justified because state policies cannot be reconciled with the overarching federal goal of establishing a "uniform" ICC rate.[92] Claims of overarching federal policies being frustrated are misplaced and should be rejected.

The argument is exactly what the Supreme Court rejected in *Louisiana PSC v. FCC*. The Commission may not, without adequate authority, pursue a course "which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."[93]

As demonstrated here, no such authority exists for the scope of preemption that the ABC Plan proposes. Indeed, the federal policy that is allegedly violated is the structure of the 1934 Act itself. Nor has there been any demonstration on the record by the ABC Plan Filing Companies that a real policy conflict exists. Rather, the record reflects that reforms to universal service and ICC are widely embraced by the majority of state and federal regulators.[94]

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[92] *Id*., at 26; *see also, id*., at 27-29.

[93] *Louisiana Pub. Serv. Comm'n v. FCC*, *supra,* 374-75.

[94] *See, e.g.*, Comments of the Regulatory Commission of Alaska, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 25; Comments of the California Public Utilities Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 19; Comments of the Public Service Commission of the District of Columbia, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 3; Comments of the Kansas Corporation Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 38; Comments of the Indiana Regulatory Utility Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 11; Comments of the Missouri Public Service Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 19-24; Comments of the Nebraska Public Service Commission, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 25-27; Comments of the Public Utilities Commission of Ohio, WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 45-46; Comments of the Washington Utilities and Transportation Commission WC Docket No. 10-90, *et al.*, filed April 18, 2011 at 6-13.

The ABC Filing Companies claim that the "impossibility" of reconciling disparate intrastate and interstate access charges is due to arbitrage.[95] This claim is baseless. Arbitrage can be addressed through enforceable and concrete phantom traffic rules. The ABC Plan does not even address specific actions that could discourage arbitrage.

The ABC Plan Filing Companies assert that the absence of uniform rates is a hindrance to deploying broadband and new IP-based services and products.[96] The experiences of the Nebraska Companies and other rural LECs show without doubt that real world deployment of broadband is occurring with existing ICC mechanisms. The ABC Plan Filing Companies have failed to explain, let alone justify, why they have not used their own ICC revenues to build broadband facilities.

In truth, ICC-generated revenue assists with cost recovery and increase the ability of carriers to make additional broadband investments. The truth is thus the polar opposite of the assertions in the ABC Plan. If the ABC Plan is adopted, the loss of revenue from ICC and the preemption of state commission jurisdiction over intrastate access rates will have a harmful effect on broadband deployment. Companies like the Nebraska Companies that have demonstrated their commitment to serve rural America through the infrastructure they have already deployed will, in large numbers, have to eliminate further broadband investment.

F. The ABC Plan Actually Frustrates Federal Policy Associated with the Longstanding Federal-State Partnership For Universal Service.

Section 254 of the 1996 revisions to the Act "plainly contemplates a partnership between the federal and state governments to support universal service,"[97] and that "it is appropriate—

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[95] *See*, ABC Plan, Attachment 5, at 18, 28-29.

[96] *See, id.*, at 18, 28-29.

[97] *Qwest Corp. v. FCC, supra,* at 1203; *Qwest Communications Int'l Inc. v. FCC, supra,* at 1232.

even necessary—for the FCC to rely on state action."[98] The Commission clearly understands this fact. In the *CAF NPRM*, it has expressly recognized the existence of a "federal-state partnership" regarding universal service as well as the interplay between the objectives of universal service and proper ICC reform. In fact, the Commission specifically sought comment on a number of issues regarding the ways by which states could "contribute to preserving and advancing universal service—both in deployment and adoption?"[99] The Commission's efforts to encourage the federal-state partnership are in harmony with other aspects of the Act as well as prior Commission actions.

In Section 254(f), Congress expressly anticipated that states take action to preserve and advance universal service, and it authorizes states to maintain their own universal service funds.[100] Likewise, federal law also charges states with the designation of carriers as ETCs.[101] The Commission also has recognized the important role of the states.[102]

Other provisions of federal law also recognize that individual states and territories play an important role in accomplishing universal service goals.[103] Notably, Section 706 of the 1996 Act directs "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services" to "encourage the deployment on a reasonable and timely basis of

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[98] *Qwest Corp. v. FCC, supra*, at 1203.

[99] *CAF NPRM*, at para. 86; *see also, id*., at paras. 84-87.

[100] 47 U.S.C. § 254(f).

[101] *See*, 47 U.S.C. § 214(e).

[102] *Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559, 22568 para. 17 (2003). ("The Act makes clear that preserving and advancing universal service is a shared federal and state responsibility.")

[103] *See*, 47 U.S.C. § 1301(4). ("The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the Nation.")

advanced telecommunications capability to all Americans."[104] The Commission has understood Section 706(a) to authorize the Commission and state commissions to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, encouraging the deployment of advanced telecommunications capability.[105]

Despite these clear indications from the Congress and the Commission that it desires cooperative efforts with states, the ABC Plan (and presumably by its silence the RLEC Plan) takes a bold position on preemption. The Commission is urged to preempt state ratemaking on the ground that all PSTN terminations are interstate, but also to preempt longstanding state regulations such as COLR obligations, despite their obvious role in preserving and advancing universal service. The ABC Plan Filing Companies claim that the preemption they seek would advance federal policy. Not only is this claim baseless, but the exact opposite is true. Preemption of intrastate rates as a universal service measure thus violates the intention of Congress in enacting Section 254 and frustrates Congressional policy supporting partnership with the states, which is yet another reason for the Commission to reject the preemption sought by the ABC Plan Filing Companies.

The State of Nebraska has instituted its own state universal service fund. Indeed, the Nebraska Companies rely heavily on the Nebraska Universal Service Fund ("NUSF") as an integral component of their cost recovery and maintenance of rational, affordable and reasonably comparable rates to those charged in more urban areas of Nebraska. As of 2010, the cost recovery funding from the NUSF for the Nebraska Companies was approximately $27.2 million.

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[104] 47 U.S.C. § 1302.

[105] 47 U.S.C. § 1302(a); *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24046, para. 74 (1998) (*Advanced Services Order*); *Preserving the Open Internet Order*, FCC 10-201, paras. 117-123.

These monies, along with the retail rates, subscriber line charges and all ICC revenues, provide the basis for rational future infrastructure investment, notably including broadband investment, along with the maintenance, operation and upgrades of the then existing network. If the non-cost based default rate of $0.0007 proposed by the ABC Plan is adopted (setting aside for now the illegality of doing so as demonstrated herein), the Nebraska Companies respectfully submit that ABC Plan and the RLEC Plan are likely to create incentives for states to reduce or eliminate state funds.[106]

Nebraska, like most states with a state fund, levies surcharges on intrastate retail revenues.[107] At the same time, the Commission is being asked to determine that effectively all PSTN telecommunications are interstate due to their alleged (but otherwise not proven) inseverability. If the Commission were to adopt the ABC Plan, it would impair the revenue base relied upon by state commissions for their state universal service programs. At the least, the Plan would reduce the proportion of telecommunications services that a state could legitimately claim as subject to a surcharge on intrastate telecommunications. At worst, states would be confronted by carrier claims that they no longer offer any intrastate telecommunications and thus cannot be required to contribute at all. Such results would undermine, if not eliminate, any practical application of the very federal-state partnership on universal service that the Commission has indicated in the CAF NPRM that it wants to foster.

Moreover, rate preemption is likely to deter or even prevent states from accepting shared responsibility for universal service. If the Commission preempts intrastate access and reciprocal compensation, states will no longer have authority over intrastate rates. Common sense suggests

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[106]*See*, Section VII.I of these Comments, *infra*, for further discussion of this issue.

[107]*See, e.g.,* State High Cost Funds: Purposes, Design and Evaluation, National Regulatory Research Institute (January 19, 2010) at 69-70.

that states may interpret this action as sending a message that they no longer have any meaningful authority or responsibility for telecommunications traffic. The logical outgrowth of such action would, therefore, reduce the motivation of states like Nebraska to continue to impose universal service surcharges and to continue to cooperate in designating ETCs, as encouraged under Section 214(e). Similarly, it should be expected that large carriers will argue that states are preempted from supporting universal service.

G. The Commission Should Reject Proposed Preemption of State Carrier of Last Resort and ETC Requirements.

In an attempt to sweep away all vestiges of state regulation, the ABC Plan requests that the Commission effectively preempt state COLR policies while refraining from imposition of comparable federal requirements.[108] Similarly, the ABC Plan recommends that the Commission find that existing federal ETC obligations undermine federal policies associated with "legacy universal service programs."[109] In the ABC Plan's preferred regulatory system, all existing obligations of ETCs are abolished immediately, and no supported carrier thereafter is obligated to do anything beyond whatever duties it may accept voluntarily as a matter of contract.

Each of these steps would create great harm to decades of work by states to promote universal service, thereby failing to preserve existing universal service levels and would also violate explicit statutory limitations on the Commission's own authority. Accordingly, the ABC Plan's treatment of COLR and ETC obligations should be rejected.

1. ETC treatment under the ABC Plan is not reconcilable with the Act.

The Nebraska Companies have previously submitted comments on the issue of Act's directives regarding state commission authority over the designation of the ETCs. Likewise, the

[108] *See*, ABC Plan, Attachment 1, at 13.
[109] *Id*.

Nebraska Companies have submitted comments regarding eligibility for federal USF disbursements and regarding the requirement that ETCs be common carriers. The Nebraska Companies incorporate these earlier comments by reference.[110] The additional comments below demonstrate that the ABC Plan's treatment of ETCs is not reconcilable with the Act.

First, the ABC Plan states that existing federal ETC policies "inefficiently skew the market and make it difficult (or even impossible) for carriers to upgrade from legacy architecture, thus diverting capital that could be used for broadband deployment."[111] The ABC Plan provides no factual basis whatever for this assertion. The Nebraska Companies have assigned capital for broadband deployment, and in some cases because of these ETC requirements. Indeed, it is virtually inconceivable that any set of facts could justify either the factual assertions in the ABC Plan or an outright violation of federal statutes.

Second, contrary to the implications in Attachment 5 to the ABC Plan,[112] federal law allows universal service support to be paid only to common carriers that have been designated as ETCs. The broadest the obligations of ETCs are defined in statute. For example, ETCs must offer to serve all customers in their designated service area and must advertise the availability of such services[113] and must demonstrate the use of the federal USF disbursements for which they are intended.[114] The services supported by federal USF are set out in rule.[115]

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[110] *See*, Reply Comments of the Nebraska Rural Independent Companies, WC Docket 10-90, *et al*., filed May 23, 2011, at pages 16-22.

[111] ABC Plan, Attachment 5, at 7.

[112] *See, e.g., id.*, at 6, 44-47.

[113] 47 U.S.C. § 214(e)(1).

[114] *See*, 47 U.S.C. § 254(e); *see also*, 47 C.F.R. § 54.209.

[115] 47 C.F.R. § 54.101.

Third, and also contrary to the ABC Plan Filing Companies' contentions, the Commission cannot disregard the requirement that only common carriers can be designated as ETCs and can receive federal USF high-cost support.[116] The Commission cannot forbear from this requirement,[117] since the requirement restricts the Commission from funding certain providers. The forbearance statute is not a license for the Commission to ignore limits on its own powers.

Finally, to provide funding to broadband providers, the Commission must first expand, in conjunction with the states, Section 54.101 to include broadband,[118]declare the recipient to be a common carrier,[119] and it must then allow the carrier to apply for an ETC designation from a state commission[120] or, in some states, from the Commission itself.[121] Contrary to the ABC Plan Filing Companies' assertion,[122] these statutes are not ambiguous. The Commission would not be entitled to deference from a reviewing court of an interpretation at variance with this clear statutory text.

2. The ABC Plan's treatment of COLR obligations cannot be rationally sustained without compromising universal service.

The Nebraska Companies respectfully submit that one of the principal means by which states have advanced universal service over the years has been adoption of COLR obligations, the very obligations that the ABC Plan Filing Companies seek to eliminate. These obligations

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[116]*See*, 47 U.S.C. § 214(e)(1) and 254(e).

[117]*See, e.g.*, ABC Plan, Attachment 5, at 48-49.

[118]*See*, 47 U.S.C. §§ 254(a)(2) and 254(c).

[119]*See*, 47 U.S.C. § 214(e)(1).

[120]*See*, 47 U.S.C. § 214(e)(2).

[121]*See*, 47 U.S.C. § 214(e)(6).

[122] ABC Plan, Attachment 5, at 6, 47.

have been imposed as a condition of franchises granted to LECs. Due in large part to these state COLR policies, the country achieved a high level of telephone penetration even before Congress enacted a statute mandating state universal service policies. By March of 1996, 93.8% of the households in this country had telephones. Fifteen years later, that number has been increased only slightly. The most recent penetration figure is 95.0%, only 1.2% above the 1996 figure.[123] The Nebraska Companies believe that COLR policies, coupled with adequate universal service funding, are largely responsible for this high penetration. This success should not be compromised by elimination of COLR obligations.

The ABC Plan Filing Companies assert that legacy universal service obligations are "incompatible with the transition to broadband networks because in many cases they require incumbent LECs (and only incumbent LECs) to divert resources from the deployment of broadband networks."[124] This argument totally ignores the existence and importance of voice service. In the view of the ABC Plan Filing Companies, dollars spent to provide voice service are dollars "diverted" from the more important task of constructing facilities for broadband. While broadband is indeed important, it is not the only thing. Indeed, broadband is not even listed as a supported service under Section 254.

To the contrary, the ABC Plan effectively proposes to preempt state universal service policies and not replace them with comparable federal requirements. The result would be a summary disappearance of the duty to serve, as it has evolved over the last century or more. States could no longer require ILECs to serve unserved areas, nor could states even require ILECs to provide service to a customer from nearby facilities. Preemption of COLR obligations

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[123] *See*, FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *Trends in Telephone Service*, September 2010,Table 16.1.

[124] ABC Plan, Attachment 1, at 13.

would patently violate the Congressional mandate that the Commission is to preserve and advance universal service.[125]

The ABC Plan Filing Companies assert that that state COLR policies "burden" federal universal service mechanisms, but the claim is without any basis. State COLR policies are essential to maintaining universal service, particularly since they are often more rigorous than the parallel federal ETC obligations which often allow carriers to qualify as ETCs while providing facilities to only a small subset of their potential subscribers. The Nebraska Companies respectfully submit that federal policy relies on these same state COLR obligations to accomplish the federal goal of universal service.

Similarly, the Commission should reject the ABC Plan's effort to limit COLR obligations to whatever obligations a state can "fully fund . . . with explicit support" and the ILEC voluntarily agrees to accept. The argument fails to recognize that rates are compensation to utilities for undertaking public obligations. The ABC Plan argument is no less than a request to abandon the concept of a utility as an entity that is engaged in a public pursuit with obligations greater than other private companies.[126] Accordingly, the ABC Plan's suggestion regarding state-funded COLR obligations should be rejected.

H. Conclusion - The ABC Plan's Extensive Preemption Proposals Should be Rejected Outright.

Try as the ABC Plan Filing Parties may, their theories of preemption cannot be sustained and, as a matter of rational public policy, should be rejected outright. Adoption of any of the

[125] *See*, 47 U.S.C. §§ 254(b)(5) and (d); *see also Qwest Communications Int'l. Inc. v. FCC*, *supra*, at 1222 (various FCC actions invalidated as not promoting and advancing universal service).

[126] The ABC Plan Filing Companies' argument also fails to recognize that should the Commission preempt all switched traffic as interstate, states will have very little ability to generate USF revenues, even should they wish to do so. It is also noteworthy that the ABC Plan does not suggest elimination of special legal protections that are provided by the states such as eminent domain and limits on liability for failure to provide service.

preemption theories will lead to uncertainty and additional litigation. Each result will increase the drain on companies' resources and increase the tension between the states and the Commission. Consistent with the Commission's discussion in the *CAF NPRM*, a better and more rational approach would be to foster the universal service partnership between the states and the Commission, including intercarrier compensation as an integral component. Also, the Commission should encourage continuation and expansion of state universal service fund participation in universal service, not eviscerate those state policies as the ABC Plan suggests.

IV. A REASONABLE CORPORATE OPERATIONS EXPENSE LIMITATION FOR RATE OF RETURN COMPANIES CAN BE ADOPTED WITHOUT AFFECTING UNIVERSAL SERVICE.

To place the following comments in context, the Nebraska Companies note that, in the *CAF NPRM*, the Commission requested parties to propose methods by which reasonable constraints on the current size of the federal USF could be established in order to meet what the Commission indicated to be the current level of federal USF funding.[127] In response to this directive, the Nebraska Companies undertook the effort to identify the reasonable constraints on operating expenses and costs that could be achieved in the USF program for rural LECs in a manner that should not adversely affect universal service. Subject to the ability of rural LECs through some reasonable waiver process to demonstrate that such constraints should not apply to them, the Nebraska Companies actually have proposed how such constraints could be established.[128] Thus, neither the Commission nor the Nebraska Companies are working from a blank slate in this area. With this context, therefore, the Nebraska Companies respectfully

[127] *CAF NPRM*, at para. 201.

[128] *See*, Comments of the Nebraska Rural Telephone Companies, WC Docket No. 10-90, *et al*., filed April 18, 2011, at 16-24.

submit the following comments in response the corporate operations expense cap aspects of the *Further Inquiry*.

The *Further Inquiry* seeks comment on a revised formula for limiting corporate operations expenses of Rate of Return ("RoR") companies.[129] The *Further Inquiry* then asks for comment on applying the corporate operations limitation to high-cost loop support (HCLS), interstate common line support (ICLS), and local switching support (LSS).[130]For the reasons stated herein, the Nebraska Companies respectfully recommend that following modifications of the corporate operations expense cap:

- The cap should be based on total operating expense, not just corporate operations expense.
- If the cap is only applied to corporate operating expenses, the cap should be applied to the entire corporate group (or if applicable the holding company) to promote efficiency and limit "gaming."
- A regression analysis of actual company costs should be undertaken to estimate the mean expense level. A cap should be statistically determined based on the sample variance. A streamlined waiver process should be available for extraordinary expenses.
- New operating expense limits would apply only to future universal service support calculations.

A. Capping Total Operating Expense Would Be More Meaningful Than Capping Only Corporate Operations Expense.

[129]*See, Further Inquiry* at 6.
[130]*Id*.

The Nebraska Companies respectfully submit that a cap based solely on corporate operations expense is too narrow to be meaningful. The Part 32 definition for Account 6720 – General and Administrative Expense (i.e. Corporate Operations Expense) includes ten (10) major sub-headings,[131] which, from a practical perspective, shows this category of expense to be a veritable catch-all. Moreover, expenses recorded to this account are, by necessity, subject to interpretation by the company making the classification. Thus, a given company might classify certain expenses not as corporate operations expense but as another type of expense not subject to the limitation. For example, an executive reviewing a capital budget for new outside plant might book time to Cable and Wire Facility Expense rather than Corporate Operations. Regardless of the executive's intent, the executive's action could potentially circumvent the corporate operations expense cap and result in universal service support for an uncapped expense account.

As a result, the Nebraska Companies respectfully suggest that any expense cap adopted by the Commission be broadened to include total operating expenses, such as the operating expense constraint suggested by the Nebraska Companies.[132] The limit on total operating expenses should reflect the operating characteristics of the service area, and, in the case of holding company subsidiaries, allocated on a consistent per-line basis. If the limit on operating expenses were tied to the area served in this manner, holding companies would not be able to allocate expense among study area subsidiaries in the most advantageous manner. Inclusion of additional expense categories would also be more meaningful because it would eliminate the

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[131] Account 6720 includes corporate policy, strategic planning, accounting and financial services, government, regulatory and intercompany relations, personnel, general purpose computing, legal, procurement, research and development and general administration. *See generally*, 47 C.F.R. §32.6720.

[132] *See*, *Ex Parte* Letter, WC Docket No. 10-90, *et al.*, to Marlene H. Dortch from the Nebraska Rural Independent Companies, dated January 7, 2011.

effects of interpretation and variability in classification and would be more difficult to circumvent.

B. The Expense Cap Should Apply to an Entire Corporate Group at the Holding Company Level, Not Individual Study Areas.

Consistent with the above, and if the cap applies just to corporate operations expense,[133] the cap should apply at a total corporate level for stand-alone companies (i.e., at the study area level) or at a holding company level where multiple companies are commonly owned. Many corporate activities are conducted at the holding company level, because these areas require minimal study area specific attention. For example, strategic planning, regulatory, accounting and property management are all usually performed at a holding company level. Applying the cap at the holding company level captures all of the factors that affect operational characteristics, regardless of whether they are incurred at the holding company level or at the study area level. Moreover, a cap applied at the holding company level not only eliminates incentives for "gaming" based on optimizing expense allocations among the subsidiary ROR companies, but it is more likely to appropriately reflect the operating efficiencies that the holding company may be able to achieve.

C. The Cap Should Be Based on Regression Studies.

In the *Further Inquiry,* the Commission does not explain how the new Corporate Operations Expense Limitation was determined.[134] Presumably, a statistical regression was conducted using NECA data with an upper limit set 15% above the mean, although the

[133] The Nebraska Companies recognize plant specific expenses may vary from study area to study area, and thus, if the cap included accounts other than corporate operations expense then the cap should be applied on a study area basis.

[134] *See, Further Inquiry* at 6.

methodology is not clear from the information provided in the Notice.[135] Depending on the data source, however, other variables such as median incomes in the service area, median housing values in the service area, number of customers and customer density might prove to be significant.

A regression equation represents a mean value, which in this case is the average corporate operations expense amount. Thus, some companies' expenses would be higher and some will be lower than the statistically derived mean. While the *Further Inquiry* does not explain how the "allowance of 115%" was determined,[136] the cap should nonetheless be statistically determined based on the sample variance. Several methods could be used to statistically derive a cap. For example, a cap could be developed that is one standard deviation above the mean by adding the standard error to the coefficient for each term. Simply increasing equation coefficient by a fixed percentage to create a cap is inappropriate because such a cap could be too high or too low depending on the sample variance. Furthermore, when a regression equation is used to estimate expenses or set caps on expenses, it is important to periodically revise and update the equations with current data. In the period between updates, adjustments to the caps for inflation would be reasonable to reflect increases in costs.

The Nebraska Companies also respectfully submit that the cap should be established at a level high enough to allow companies facing unique cost demands to not be clipped by the cap. Even with a reasonable cap, some companies face unique circumstances that force them to increase operating expenses. These circumstances might include natural disasters or even include an extraordinary burst of regulatory activity. Therefore, any operating expense cap

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[135] *See, id.*

[136] *Id.*

should include a streamlined waiver process for circumstances where legitimate operating expenses have exceeded the cap.

V. RELIANCE ON SATELLITE TECHNOLOGY WOULD VIOLATE SECTION 254 AND WOULD CREATE SERIOUS TECHNICAL PROBLEMS.

The ABC Plan recommends excluding the highest-cost census blocks from the calculation of the baseline CAF support amount.[137] To identify the highest-cost census blocks, the ABC Plan proposes that if the average cost per service location of a census block exceeds the "alternative technology threshold" of $256 per location per month, that census block would be excluded from baseline support available under the CAF.[138] Under the ABC Plan, therefore, customers in the highest-cost areas will have only satellite-based broadband service.[139]

Although the ABC Plan dramatically increases the amount of USF support for price cap companies – up to $2.2 billion annually for 10 years – its proposals regarding satellite technology would relegate high cost customers to second-rate service. The ABC Plan is also fatally flawed because it relies on an inadequate broadband speed standard and relies on inaccurate geographic data about broadband availability.

A. The ABC Plan Violates Section 254 by Relegating High Cost Customers to Substandard (and Possibly No) Broadband and Voice Services.

Relying solely on satellite service for the highest-cost areas, the ABC Plan would shift CAF support to other less-costly areas. This proposal would harm universal service, in violation of Section 254, for both broadband and voice services.

[137] ABC Plan, Attachment 1, at 5.

[138] ABC Plan, Attachment 1, at 4-6, Attachment 2, at 2, Attachment 3, at 19.

[139] ABC Plan, Attachment 1, at 5.

As the Nebraska Companies detailed in a previous filing,[140] satellite technology is vastly inferior to wireline technology as an Internet access medium. First, satellite broadband suffers from weather sensitivity. It is simply impossible to use satellite systems during periods of extreme weather which makes satellite service an unreliable telecommunications source, a particular concern when reliable emergency communications are needed to respond to unfolding weather events.

Second, there are some hilly and mountainous areas where geographic features block satellite access. This problem is particularly serious in higher latitudes where low angles are needed for line-of-sight transmission. A customer who lives on the north-facing slope of a valley in a high-cost area could very well have neither a telecommunications service available nor any federal universal service support available to a provider who could serve that area.

Finally, because a large number of users over a multi-state region share the same satellite and spectrum capacity, satellite services typically restrict connection speeds and the amount of data that can be transmitted.

Voice service over satellite is inferior for all the same reasons. In addition, satellite-based voice service has latency created by the required one or sometimes two round trips to a

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[140] *See*, Reply Comments of the Nebraska Companies, WC Docket No. 10-90, *et. al*, filed May 23, 2011, at 58.

geosynchronous satellite.[141]This problem with satellite service is unavoidable, as satellite providers themselves admit.[142]

The ABC Plan, if adopted, would lead to elimination of voice service in some areas. The ABC Plan would offer support only for broadband networks. Therefore, it would apparently eliminate all ongoing support for voice-only networks in these highest-cost areas. The ABC Plan ignores this problem. The ABC Plan fails to include any financial or legal provisions to prevent abandonment of terrestrial voice service. No demonstration has been made that abandonment of terrestrial voice service would serve the public interest or be consistent with Section 254. Consumers relegated to satellite service will not have voice or broadband service that is comparable in quality or price to that provided to customers in urban areas.

B. The Satellite Proposals in the ABC Plan Violate Support Eligibility Rules in Section 214(e) of the Act.

The ABC Plan's treatment of satellite service also violates the support eligibility rules in the 1996 revisions to the Act. It has not been demonstrated that any satellite provider would be or could be eligible to be an ETC pursuant to 47 U.S.C. § 214(e). Satellite service providers may indeed want to serve less densely populated areas, especially if they might receive some federal USF funding. Under the Act, however, a supported provider must be a common carrier of

[141] The Nebraska Companies have filed significant analysis regarding these issues previously in these dockets, see Vantage Point Solutions, *Nebraska Rural Independent Companies: An Engineering Analysis of the Broadband Assessment Model Using Actual Network Data*, July 2010 filed with NRIC comments on July 12, 2010, at 5 and 65-66 and *see*, Reply Comments filed on May 23, 2011, at 57-63.

[142]*See*, Reply Comments of the Nebraska Companies, WC Docket No. 10-90, *et. al*, filed May 23, 2011, at 63; see also, Comments of ViaSat, Inc. and Wildblue Communications, Inc., WC Docket No. 10-90, *et. al*, filed July 12, 2010, at 4, n. 8.

telecommunications service.[143] These issues must be addressed before the financial impacts of the ABC Plan can be assessed.

C. The Satellite Provisions in the ABC Plan Will Harm Customers of Rural Carriers But Largely Protect Price Cap Carriers.

The RLEC Plan is silent on the "alternative technology threshold" in the ABC Plan, and the RLEC Plan proponents do not expressly object, and therefore must be construed as tacitly supporting, the ABC Plan that some high-cost customers will have service available only by satellite. The Nebraska Companies respectfully submit that, no matter what the RLEC Plan proponents might hope for, there exists a real potential that, if adopted, any satellite provisions applicable to price cap areas eventually will be applied to all rural areas. The RLEC Plan supporters have agreed to the same budget caps and allocations as in the ABC Plan proponents.[144] These caps would very likely force the Commission to adopt some kind of similar "alternative technology threshold" for rate-of-return areas.[145] The net result would be that rate-of-return companies would find that they can no longer recover their existing investments in areas with costs above the alternative technology threshold.

If the "alternative technology threshold" were applied in all of Nebraska, approximately 35,000 or approximately 9.8% of the households outside of the Lincoln and Omaha metropolitan

[143] 47 U.S.C. §§ 214(e)(1), 254 (c)(1). The Nebraska Companies also note that only common carriers are also liable to be ordered to serve an unserved area if no other common carrier is willing to serve that area. 47 U.S.C. § 214 (e)(3).

[144]*See, US Telecom Letter,* at 2.

[145] The very rationale in the ABC Plan for relegating approximately 730,000 customers served by price-cap carriers to satellite service is so that the ABC Plan stays within the budget cap, "To meet the $2.2 billion target, the model excludes the highest-cost census blocks from the CAF support calculation by setting the alternative technology threshold at $256 per month." *See,* ABC Plan, Attachment 1, at 5. As discussed in these comments, since there is not enough money in the budget cap agreed to in the RLEC Plan it is reasonable to assume that if the FCC were to accept the Alternative Technology Threshold for price-cap carriers it would also accept it for RoR carriers under their budget cap. *See, US Telecom Letter,* at 2.

areas would be ineligible for federal high-cost universal service support.[146] Of these 35,000 households, over 15,000 are in the service areas served by the Nebraska Companies. Since this represents 25% of the households that are currently served by the Nebraska Companies, applying this threshold to the Nebraska Companies would create a materially adverse impact on their ability to recover the costs of deploying, maintaining and operating infrastructure.

The satellite provisions in the ABC Plan are highly favorable to the price cap carriers that designed them. Excluding very high-cost areas from baseline support would not likely harm price-cap carriers because these carriers generally have not invested in any broadband facilities in those areas. In contrast, if "alternative technology threshold" is applied to RLECs' high-cost areas, it is likely that the debt service on a substantial amount of existing investment by rate-of-return companies will be placed at risk.

D. To The Extent Price Cap Carriers Have Made Investments In Rural Areas, Under The ABC Plan, Such Carriers Are Afforded The Right Of First Refusal To Accept Universal Service Support.

In the event that price cap carriers have "already made high-speed Internet service available to more than 35 percent of the service locations in the wire center . . ." the ABC Plan

[146] The Nebraska Companies calculated the number of households in Nebraska affected by the alternative technology threshold through the use of the model that the Nebraska Public Service Commission uses to calculate Nebraska Universal Service Fund high cost support. This model, the Nebraska Universal Service Fund Support Allocation Methodology (the "NUSF SAM Model"), distributes NUSF support to carriers on a "total loop cost per support area basis." Within the NUSF SAM Model, the entire state is divided into 1,632 support areas. Each support area is populated with census data to determine each support area's square miles, number of households, and household density per square mile. Loop cost per household for each support area is calculated according to an exponential function of household density that approximates the relationship between loop cost and household density indicated by the Benchmark Cost Proxy Model. The number of households in support areas with loops that exceed the alternative technology threshold cost of $256 per month as specified in the ABC Plan were identified as ineligible for receipt of future federal CAF support.

provides price cap carriers protection in the form of a Right of First Refusal.[147] Under those circumstances the incumbent may "accept or decline the baseline support and the associated broadband service obligations."[148] To determine whether more than 35 percent of a wire center is served, the ABC Plan relies, in part, on the National Broadband Map produced by the National Telecommunications & Information Administration ("NTIA").[149]

E. The ABC Plan Is Fatally Flawed Because It Necessarily Relies on Inaccurate Geographic Data about Broadband Availability.

The ABC Plan depends critically on unreliable geographic data. The ABC Plan would grant price cap carriers a Right of First Refusal for federal support if the carrier has "already made high-speed Internet service available to more than 35 percent of the service locations in the wire center…"[150]Under those circumstances the incumbent may "accept or decline the baseline support and the associated broadband service obligations."[151]To determine whether more than 35 percent of a wire center is served, the ABC Plan relies, in part, on the National Broadband Map produced by the National Telecommunications & Information Administration (NTIA).[152] Unfortunately, the National Broadband Map does not accurately depict broadband service in census blocks greater than two square miles, which is typical of the areas served by the Nebraska Companies and many rural companies.

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[147]*See*, ABC Plan, Attachment 1, at 6.

[148]*Id.*

[149]*See, id.*, Attachment 2, at 1-3, and Attachment 3, at 5.

[150]*See*, ABC Plan, Attachment 1, at 6.

[151]*See, id*.

[152]*See, id.*, Attachment 2, at 1-3; Attachment 3, at 5

In the experience of one of the Nebraska Companies, the NTIA National Broadband search tool did not accurately identify which locations have broadband capability.[153] Further, NTIA's National Broadband search tool also appears to understate the available broadband speed at particular locations.[154] Considering the data inaccuracies in the National Broadband Map, the Commission should not use the National Broadband Map as a source for broadband capability until the data problems have been resolved.

Under the ABC Plan, the Right of First Refusal protection will not protect the current investment of rural companies serving customers in census blocks greater than two square miles. Accordingly, the Nebraska Companies urge the Commission to refrain from extending the ABC Plan's "alternative technology threshold" to areas served by rate-of-return companies.

F. The Proposed Broadband Speed is Too Low.

The ABC Plan also proposes a minimum broadband speed for receipt of CAF recipients of 4 Mbps downstream and 768 kbps upstream. This proposal raises equally serious concerns under Section 254.

The ABC Plan proposes to set the broadband speed standard even lower than the much-criticized 4 Mbps downstream-1 Mbps upstream proposal from the National Broadband Plan.[155] Last year, various rural telecommunications trade associations railed against the 4/1 Mbps standard, saying it "would create a rural/urban digital divide for millions of America, in violation

[153] Consolidated Telephone Company ("Consolidated") reviewed a sample of eight rural locations in large census blocks of its Brewster and Hyannis exchanges. All eight locations are broadband capable; however, when the addresses were input into the NTIA National Broadband search tool, the NTIA identified all eight locations as having no broadband service providers.

[154] Consolidated can reach over 98% of its customers with DSL. Further, nearly two-thirds of these customers can receive speeds in excess of 3 Mbps down and 768 Kbps up, but the NTIA mapping data shows that less than 7% of Consolidated's households can receive this speed.

[155]*See*, Comments of the NECA, NTCA, OPASTCO, WTA, and The Rural Alliance ("NECA et. al.") filed July 12, 2010, at 15.

of the reasonable comparability and sufficiency principles contained in section 254(b) of the Act," and "will be outdated before the Plan is adopted."[156]If a "4/1" Mbps standard was in violation of the Act, obviously a "4/0.76" Mbps standard is even more inadequate.

Moreover, just as the Commission's decisions on satellite technology could not be contained to price cap company areas, so too would any broadband speed standard eventually spread to rate-of-return carriers. It is nonsensical to believe that regulators would adopt one broadband speed standard for areas served by carriers under one form of switched service rate regulation and adopt a different broadband speed standard for areas that happen to have a different form of switched service rate regulation. Moreover, the effects on rate-of-return carriers and their customers will likely be more severe because rate-of-return carriers often have a significantly larger percentage of their customer base in high-cost areas.

VI. THE ABC PLAN'S TREATMENT OF INTERCONNECTED VOIP AND INTERNET PROTOCOL TRAFFIC SHOULD BE REJECTED AND SUPPLANTED BY THE FRAMEWORK ALREADY ARTICULATED BY THE NEBRASKA COMPANIES.

Based on the ABC Plan being solely a "price cap" plan, it may be convenient to simply state the ABC Plan's proposal for interconnection "rules" and "framework" only apply to price cap carriers. However, the Nebraska Companies respectfully submit that such is not the case. The ABC Plan's sweeping changes included in the approximately 18 words in footnote 10 may, if adopted, very well alter the regulatory landscape for all carriers and all services whether Internet Protocol ("IP") or Time Division Multiplex ("TDM"), broadband or voice, or a combination thereof.[157]

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[156]*See, id.,* at 16-17.

[157] The *US Telecom Letter* states that "to the extent that the Commission considers material changes to individual components of this framework, it should recognize that individual parties will likely withdraw their support for – and indeed may very well oppose actively – other

The ABC Plan provides neither a rational public policy nor a proper legal basis for its proposed intercarrier compensation and interconnection treatment of what is commonly known as "interconnected VoIP" traffic[158] (although the ABC Plan does not use the term but only "VoIP traffic") or the terms and conditions under which IP-to-IP traffic would be exchanged between telecommunications carriers.[159] Rather, the ABC Plan boldly proclaims that all VoIP traffic would, on a going-forward basis, be subjected solely to either interstate access charges or to reciprocal compensation based on the "call detail"[160] associated with such traffic. Thus, the Nebraska Companies respectfully request that the Commission reject the ABC Plan's treatment of VoIP traffic and of IP-IP interconnection in its entirety and address these issues in the manner that the Nebraska Companies have already demonstrated serves the public interest.

A. The ABC Plan's Structure for Addressing IP-IP Interconnection Ignores the Act and Commission Pronouncements Regarding Commercial Agreements.

The ABC Plan's bald assertion that "IP-IP interconnection would continue to be governed by commercial agreements"[161] should be rejected outright. The ABC Plan cannot dictate what is or is not subject to the interconnection requirements of the Act. Indeed, the Commission has a proceeding that addresses some of these same issues in the context of a

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components of these proposals and/or the then-negated consensus framework as a whole." *US Telecom Letter,* at 1.

[158] *See, e.g.*, 47 C.F.R. § 9.3 (Definition of "Interconnected VoIP service").

[159] The Nebraska Companies note that the vagueness of interconnection language in the ABC Plan, coupled with the obvious incentives for dominant carriers to declare interconnection to be all-IP and thus attempt to avoid regulation, would gut the apparent intentions of rural ILEC negotiators to ensure that cost-based (albeit preemptive) interstate transport rates for TDM-originated and terminated traffic remain in place. *See, US Telecom Letter,* at 3.

[160] ABC Plan, Attachment 1, at 10 and n. 10.

[161] *Id*.

Petition of Declaratory Ruling filed by tw telecom, inc.[162] Regardless, the ABC Plan Filing Companies' contentions suffer from a series of mistaken premises that should be rejected. The Nebraska Companies are concerned that the purpose of the intentionally vague "IP-IP interconnection" language in the ABC Plan is to result in the elimination of payment of compensation under Section 251 for interconnected VoIP traffic that originates from or terminates to Northern American Numbering Plan ("NANP")-issued numbers on the PSTN. More specifically, the Nebraska Companies assert that this vagueness would result in the avoidance of payment of even the reduced switched transport rates for rate-of-return carriers that were submitted in the US Telecom Letter.[163]

First, the ABC Plan appears to suggest that any application of IP-IP interconnection is something separate and apart from the rules applicable to the PSTN.[164] The Nebraska Companies assert that any IP application that relies on the NANP numbering address system cannot be divorced from the PSTN, which relies on those very same numbering resources. To

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[162] *See*, Public Notice, WC Docket 11-119, DA 11-1198, released July 15, 2011. The Nebraska Companies have argued in such proceeding that these issues are significant and should be addressed comprehensively in a separate proceeding. *See,* Comments of the Nebraska Rural Independent Companies, *In the Matter of Petition for Declaratory Ruling That tw telecom inc. Has The Right To Direct IP-to-IP Interconnection Pursuant To Section 251 (c)(2) Of The Communications Act, As Amended, For The Transmission And Routing of tw telecom's Facilities-Based VoIP Services And IP-In-The-Middle Voice Services*, WC Docket No. 11-119, filed August 15, 2011 ("*Nebraska TWTC Comments").*

[163] *See US Telecom Letter,* at 3, n. 1. The Nebraska Companies do not support the preemptive rates and structure that were filed, but point out that the intention of these transport rates and structure -- continuing per-minute compensation for use of transport facilities -- could nonetheless be dismantled under the ABC Plan's vague "IP-IP interconnection" reliance on unregulated "commercial agreements."

[164] The ABC Plan states that the VoIP framework contained in the plan "applies only to TDM interconnection." No explanation is provided as to distinction between "TDM interconnection" and "IP-IP interconnection," which again would "continue to be governed by commercial agreement." ABC Plan, Attachment 1, at 10, n. 10.

suggest otherwise defies the practical and operational realities of how traffic is exchanged today and, quite possibly, for the foreseeable future.

Thus, the Nebraska Companies respectfully request that the Commission reject the ABC Plan's vague notions for IP-IP interconnections and declare that when IP-IP traffic is exchanged using the NANP telephone numbers for originating and/or terminating voice calls, such traffic exchange is using the PSTN, and the exchange of such traffic must be subject to the appropriate compensation regime under Section 251. This declaration is fully supported by the Act's definition of "telecommunications service" definition in 47 U.S.C. §153(46) and the "new technology service policy" definition in 47 U.S.C. §157, both of which are agnostic to the type of technology utilized with respect to the proper classification of service. The fact that any service uses IP technology rather than some other technology to deliver its voice telecommunications service is immaterial to the classification of the service.

Second, the ABC Plan apparently presumes that the Act's Section 251/252 interconnection framework does not apply to IP-IP interconnection. Such a presumption is baseless. If two telecommunications carriers offering telecommunications services are seeking to exchange traffic that is subject to Section 251(b)(5), there is no basis to conclude that the interconnection is not subject to the Section 251/252 process.[165] If telecommunications carriers

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[165] As noted by the Nebraska Companies in the *Nebraska TWTC Petition Comments*,

> Historically, the public switched telephone network has experienced several technological changes, including introduction of digitized voice coding, multiplexing in trunks, elimination of in-band signaling, and even conversion of data to telephone-specific (non-IP) packet formats. However, these technological changes have not required modification of basic definitions of the Act. As TWTC points out, protocol conversions are frequent in the wireless industry, including GSM, CDMA, TDM and all-IP 4G. *See id.* at 13. None of these technology changes has removed voice communications from the definition of telecommunications service. This history is consistent with the explicit terms of the Act, which defines telecommunications service as independent of the "form or

offering to exchange telecommunications services are involved, why would those carriers need to resort to "commercial agreements" when the framework of the Act requires otherwise? The Nebraska Companies maintain that, when provided by telecommunications carriers for purposes of terminating or originating traffic carried on the PSTN, IP-to-IP interconnection must remain subject to the Section 251 interconnection framework of the Act.[166]

Third, the ABC Plan's bold pronouncements of the structure under which IP-IP interconnection must occur – commercial agreements – also cannot be reconciled with the Commission's determination of the appropriate scope of interconnection agreements between two telecommunications carriers.

> Based on these statutory provisions, we find that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set forth in the Act. This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs.[167]

The ABC Plan presents an unexplained departure from this standard, as well as court decisions relying on it.[168] Moreover, there is no policy basis or reasonable legal theory for the broad

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content of the information as sent or received." *See,* 47 U.S.C. § 153(46).

Nebraska TWTC Comments at 4-5, n.8.

[166] tw telecom has shown that VoIP service remains a telecommunications service notwithstanding protocol conversions. *See,* Petition for Declaratory Ruling of tw telecom, inc., WC Docket No. 11-119, filed June 30, 2011, at 12-15.

[167] *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), Declaratory Ruling*, WC Docket No. 02-89, 17 FCC Rcd 19337 (2002) ("*Section 252 Agreements Declaratory Ruling*") at para. 8 (footnote omitted).

[168] *See, e.g., Qwest Corporation v. Public Utilities Commission of Colorado,* F.Supp.2d, 2006 WL 771223 (D. Colo.); *Qwest Corporation v. Public Service Commission of Utah,* F Supp 2d, 2005

elimination (and thus preemption) of state commission jurisdiction over interconnection agreements and arrangements under Sections 251 and 252 in light of what the Commission has explicitly stated to the contrary.[169]

> Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it should be approved or rejected. Should competition-affecting inconsistencies in state decisions arise, those could be brought to our attention through, for example, petitions for declaratory ruling. The statute expressly contemplates that the section 252 filing process will occur with the states, and we are reluctant to interfere with their processes in this area. Therefore, we decline to establish an exhaustive, all-encompassing "interconnection agreement" standard. The guidance we articulate today flows directly from the statute and serves to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval. At the same time, nothing in this declaratory ruling precludes state enforcement action relating to these issues.[170]

B. The ABC Plan cannot be Reconciled with the Practical Operational/Network Issues that must be Addressed as Well as Rational Public Policy.

Finally, the ABC Plan's suggestion that IP interconnection be implemented through "commercial agreements" fails to address several other far reaching and potentially detrimental consequences that could undermine universal service and the seamless transition to an all IP-IP world. For example, the ABC Plan fails to address the Commission's proper role of ensuring uniform technical standards for IP-IP interconnection.[171] From a practical perspective, technical

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[169] Since the ABC Plan "regulatory framework" preempts the states from any oversight of broadband services (*see* ABC Plan, Attachment 1 at 13), it is safe to assume that the ABC Plan's framework also would improperly suggests that states would have no authority to adjudicate interconnection issues as they plainly do under the Section 251/252 framework of the Act.

[170] *Section 252 Agreements Declaratory Ruling,* at para 10 (footnote omitted).

[171] As explained in the *Nebraska TWTC Comments*, while state commissions can fill in the blanks in the context of reviewing and/or arbitrating Section 251/252 agreements between two telecommunications carriers offering telecommunications services, the Commission's role in

standards must be addressed on a nationwide basis in order to encourage uniform treatment of the technical and operational challenges that IP interconnection presents. Absent such standards, commercial agreements (or for that matter interconnection agreements) have the potential to create inadequate and/or inflexible IP interconnection standards on a piecemeal basis. Such haphazard standard development could greatly slow the natural technical migration of the PSTN.

Likewise, from a public policy and practical perspective, reliance on "commercial agreements" fails to address the importance of Sections 251/252 in mitigating the market dominance of the ABC Plan Filing Companies, which are some of the largest telecommunications corporations in the country.[172]   The ABC Plan Filing Companies have remained conspicuously silent on any constraints to their market dominance. Instead, commercial agreements could give these Companies an opportunity to avoid their common carrier obligations and to use their market power as a basis for strong-arm tactics during commercial negotiations.[173]

Commercial negotiations are an open-ended invitation to further existing market power. The ABC Plan Filing Companies apparently could self-declare the interconnection they are seeking as IP-based and not pay lawfully assessed charges for the use of the PSTN. As the Commission stated in the *IP-Enabled NPRM*, there are no free rides on a carrier's network, and the same is true for one that use IP technology.

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ensuring nationwide uniform standards still exists. *See, Nebraska TWTC Comments* at 11-14.

[172] Fortune magazine's Global 500 list of the world's largest companies ranked AT&T 30th (revenues more than $124 billion) and Verizon 41st (revenues more than $106 billion). money.cnn.com/magazines/fortune/global500/2011/

[173] To be sure, this issue is somewhat mooted under Section 251/252 agreements where state commissions (or the FCC where state commissions fail to act) can level the playing field and determine through arbitration the issues that are left resolved.

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[174]

Any technology that uses the PSTN to originate or terminate voice traffic to or from a NANP-issued number should be subject to the appropriate intercarrier compensation regime under Section 251 including applicable state and interstate access charge regimes. As a result, the ABC Plan is fundamentally suspect due to its failure to define what is and is not IP interconnection.

The Nebraska Companies are concerned that given the obviously lax discussion of IP-IP and IP-TDM interconnection in the ABC Plan, carriers such as AT&T and Verizon will simply seek interconnection via direct trunks to rural carriers' soft switches, claim that such interconnection is IP-IP and not subject to access charges, and demand that "commercial agreements" replace tariffs (for switched access) or interconnection agreements (for reciprocal compensation). Meanwhile, the local lines to which these carriers are gaining access are still operating via TDM technology.

While the Nebraska Companies believe that a telecommunications carrier's right to seek interconnection via IP trunks or TDM trunks to rural carriers' soft switches must be addressed,[175] the apparent method by which the ABC Plan proposes to do so must be rejected. Instead, the Commission should develop specific rules that protect rural customers and the investments their carriers have made in infrastructure to serve some of the highest-cost areas of the nation. Under the vague IP-IP interconnection provisions stated in the ABC Plan, large carriers could impose

[174] *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28, released March 10, 2004 at para. 33.

[175] *See, Nebraska TWTC Comments* at 10.

unreasonable IP-IP interconnection demands on rural carriers with high transport costs even as local terminating rates preemptively drop to near-zero levels and large companies use IP as a pretext to avoid both terminating and transport rates in delivering traffic to rural carriers' customers. Even were rural carriers to dispute the non-payment of the remaining switched transport rates in place, dominant carriers such as AT&T have shown they are more than willing to withhold payments of access charges and to enter into disputes. It would defy common sense to believe that such dominant carriers would alter their behavior if the Commission adopts the ABC Plan without any accompanying interconnection rules.

Either as part of any order(s) it issues as a result of these proceedings or in another proceeding, the Nebraska Companies urge the Commission to make clear the differences between IP-IP and IP-TDM interconnection, and to make clear the differing compensation obligations (if any) under both arrangements. An IP interconnection mandate that lacks clarity on the basic compensation and legal issues such as those vaguely referenced in the ABC Plan, as well as the numerous technical and operational issues that are raised[176] simply invites uncertainty and creates a substantial risk of conflicting policies as parties and state commissions resolve interconnection standards. The Commission must deal immediately with IP-IP interconnection uncertainty or the ABC Plan will create havoc.

VII. THE INDUSTRY PLANS WOULD JEOPARDIZE UNIVERSAL SERVICE TO CUSTOMERS OF THE RURAL TELECOMMUNICATIONS INDUSTRY AND RURAL SMALL BUSINESSES ACROSS THE COUNTRY WHILE THE LARGE AND MID-SIZED COMPANIES WILL BE ADVANTAGED.

[176] The *Nebraska TWTC Comments* outlines certain of the technical standards that need to be addressed such as signaling (TDM-based Common Channel Signaling System No. 7 being reconciled with IP Session Initiation Protocol) and the treatment of VoIP features (such as "click-to-call conferencing" and "find me/follow me") and quality of service management features that manage packet flow and delays. *See, Nebraska TWTC Comments,* at 11-14.

The rural telecommunications industry, primarily run by small businesses, is presently experiencing financial difficulties that arise primarily from declining intercarrier revenues. In numerous ways, the Industry Plans will exacerbate these economic troubles. The Industry Plans reward those entities that have failed to deploy rural infrastructure while penalizing those entities, like the Nebraska Companies, that have demonstrated an on-going commitment to rural areas of the nation. These commitments were made consistent with the Congressional backdrop of the "sufficiency" and predictability" standards of Section 254 of the Act and public policies that encouraged the deployment of infrastructure that would support the provision of not only voice service but data and advanced services. In contrast, the ultimate effects of the Industry Plans are likely to be increased risk of loss of voice and broadband telecommunications services to millions of residential and small business customers that rely on these rural telecommunications providers.

Therefore, the Nebraska Companies respectfully submit that the Commission in addressing the Industry Plans will need to grapple with the legitimate and numerous concerns as to how the Industry Plans would exacerbate current trends that are harming the rural telecommunications industry and creating risks that existing services to residential and small business customers will be interrupted. This Section analyzes many of the conditions included in the Industry Plans and explains the negative impact each would have on rural companies, and more importantly how, in total, the Industry Plans, without significant modifications, will have a devastating impact on rural America.

A. Rural Telephone Companies are Small Businesses, the Economic Engine of the Economy.

Economists are counting on small businesses to pull our economy out of the recession. According to the Small Business Administration, small businesses:

- Create more than half of the nonfarm private gross domestic product (GDP);
- Employ just over half of all private sector employees;
- Pay 44 percent of total U.S. private payroll;
- Have generated 64 percent of net new jobs over the past 15 years; and
- Hire 40 percent of high tech workers (such as scientists, engineers, and computer programmers).[177]

Like many other rural ILECs, the Nebraska Companies are small businesses that provide jobs in the communities they serve and also provide high quality service that other small businesses in their service areas count on to remain viable. The Nebraska Companies serve some of the lowest density and highest-cost areas of the country – some service areas averaging fewer than 0 .5 customers per square mile. These low density areas are made up of ranches and farms that produce beef, pork, corn, and other agricultural products; the people and businesses that feed the nation and its economy. Some of the Nebraska Companies have provided quality service to their customers for more than one hundred years.

The Nebraska Companies individually have been managed in a fiscally conservative manner, generally not relying on significant amounts of debt while judiciously investing in broadband networks to serve their rural customers over time as funds are available. Over the course of several years, the Nebraska Companies have been able to deploy broadband service to most of their customers. Collectively, the Nebraska Companies are capable of providing broadband service to the vast majority of their subscribers.

[177] *See*, Small Business Administration, Frequently Asked Questions, www.sba.gov/advocacy/7495/8420.

In contrast, it is commonly held that large telecommunications companies have made limited network investments in very rural service areas. As the Commission's records reflect, the largest carriers have even sold many of those service areas to other carriers. Against this back drop, the Industry Plans, and in particular the ABC Plan, presume that these large carriers are now going to turn their economic/business interests to develop a sudden desire to invest and serve less densely populated, higher-cost-to-serve rural areas. The Industry Plans do not provide sufficient incentive for large carriers to serve these very rural areas and at the same time place rural LECs that serve similar areas in serious jeopardy.[178]

Notwithstanding a cautious but responsible approach to investment, the Nebraska Companies are under increasing financial stress, primarily due to erosion of ICC revenues. The Industry Plans largely fail to address the causes or likely effects of this financial stress. Instead, numerous elements of the Industry Plans will exacerbate those financial stresses. By way of example, the Industry Plans will severely reduce ICC revenue streams for carriers serving very rural areas. The Industry Plans reduce terminating access rates to levels that do not recover the cost of billing let alone the cost of the network. Moreover, IP interconnection provisions in the ABC Plan threaten the longevity of rate-of-return terminating transport access charges. The Industry Plans provide for only a small portion of those lost ICC revenues through end user rate increases and a Recovery Mechanism. The Industry Plans on the other hand increase profit margins for the largest telecommunications companies by decreasing access expenses and leaving large revenue streams such as special access and transiting service in place.

[178] Even if one believes the claims made by AT&T in its T-Mobile merger filing, 3% of the nation's consumers and small businesses would be left behind by the merged entity. Those customers may very well be those that live and work in the areas such as those served by the Nebraska Companies.

B. The Terminating Access Provisions are Unreasonable and Unlawful, and Are Likely to Harm Universal Service.

The RLEC Plan proposes to decrease intrastate originating and terminating access rates to interstate rates over a two-year period, to further reduce end office terminating rates over a three-year period to $0.005, and ultimately to the arbitrarily selected $0.0007 rate by the eighth year.[179] The terminating access charge provisions of the Industry Plans create numerous legal and financial problems that the Commission will need to address.

First, the Industry Plans' presume that a target-rate of $0.0007 can be sustained because it has already been found to be "just and reasonable" based on a few negotiated agreements and prior Commission actions in the context of Internet service providers.[180] However conspicuously absent from any such contention is that there is no demonstration that the presumed "default rate" is compensatory, let alone consistent with applicable pricing standards. A number of the Nebraska Companies have undertaken the negotiation and arbitration process required by Sections 251 and 252. The rates that were established in those proceedings, based on forward looking incremental costs, are well above the $0.005 rate let alone $0.0007.[181] It is unreasonable and unlawful for regulators to set rates at an arbitrary default level that is well below incremental cost. In 2010, terminating access revenues for the Nebraska Companies were $4.4 million and those revenues would be reduced to $115,000 under the Industry Plans.

Second, the ABC Plan promotes (and the RLEC Plan acquiesces in) heavy-handed federal preemptive regulation. As the Nebraska Companies advocate in Section III of these

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[179] *See,US Telecom Letter*, at 3, n.1.

[180] *See, e.g.,* ABC Plan, Attachment 5, at 3-4, 34-37.

[181] For example, the forward-looking rate for end office local switching rate for Great Plains Communications determined by the Nebraska Public Service Commission in an arbitration proceeding was $.0078, and the combined transport and termination rate was $.0130 for a total reciprocal compensation rate of $.0208 per minute of use.

Comments, preemption violates the statutory division of state and federal authority created by Congress. Preemption makes even less sense for regulators in today's environment where the Commission is concerned about the overall size of the federal USF, wants to encourage efficient use of facilities, wants to encourage further deployment of broadband, and necessarily relies on the states to be active partners in preserving and advancing universal service.

C. Recovery Mechanism Support is not Predictable or Sufficient.

Terminating rate reductions would not create Section 254 compliance issues if a Recovery Mechanism ("RM") was created that reliably replaces the lost revenue. The RLEC Plan provides that there will be RM to replace some lost switched access revenues.[182] However, the Industry Plans call for capping the Universal Service Fund at the current level of $4.5 billion and within that overall constraint capping the RLEC CAF portion at $2 billion,[183] slightly below the current level of $2.02 billion.[184] Over time, to recover some of the Industry Plans' reductions in terminating access revenues, RoR companies' RM support increases by $50 million per year, but only for an additional total of $300 million by the end of a six-year transition.[185] As discussed below, all rate-of-return switched access revenues, which the Nebraska Companies currently estimate to be approximately $1 billion, are at risk of elimination or reduction to near-zero levels under the Industry Plans. Clearly, an RM sized at $300 million falls short of what is necessary if more than terminating end office charges will be substantially decreased.

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[182] However, the RLEC Plan proponents state that if sufficient funding is "not expected for any reason to be available to provide the necessary levels" of high-cost or ICC restructuring support in a given year, reductions in ICC rates shall be deferred. *See, US Telecom Letter* at 2-3.

[183] *See, id.*, at 2.

[184] *See,* USAC's 4th Quarter 2011 filing with the FCC on August 2, 2011, Appendices HC01 and HC09. This estimate was derived by excluding non-rural carriers as well as price cap rural carriers from the referenced USAC report.

[185] *See,US Telecom Letter,* at 2.

The Nebraska Companies respectfully submit that such a constrained future universal service recovery level is neither predictable nor sufficient. To suggest otherwise would require a specific factual demonstration that has not been made.

The RLEC Plan also promises that scheduled intercarrier rate reductions will be delayed if sufficient funding is not available for high-cost support and/or intercarrier compensation.[186] The Plan gives little guidance, however, as to the methodology or standards by which the Commission might make this determination. Moreover, once the Commission has started down the path of prescribing very low terminating rates, it is uncertain from a public policy perspective how the Commission would retreat from any stated course of rate reduction based on a presumed "budget" shortfall when the *CAF NPRM* suggests otherwise.[187] Finally, it is highly unlikely that the Commission will act in a timely manner to address a particular issue such as insufficient funding. The Commission has demonstrated time and again the inability to act swiftly, whether in addressing problems such as phantom traffic, addressing a policy issue such as the identical support rule, or adhering to the Commission's self-imposed deadlines for taking action such as separations reform or evaluation of universal service mechanisms.

Regardless of what the Commission might do, any attempt to delay these rate decreases for RoR companies would likely be exacerbated should the Commission adopt the Industry Plans' ICC recommendation for VoIP traffic. As discussed in these comments, incentives will be presented for carriers to self-declare all their traffic as VoIP and thus subject to at best interstate rates in the first two years, then eventually decreasing to $0.0007. Additionally, the Nebraska Companies have already demonstrated in Section VI addressing the regulatory

[186] *See,US Telecom Letter*, at 2-3.

[187] *See, e.g., CAF NPRM*, at para. 23 ("We seek comment on the appropriate size of these programs. We propose that, together with remaining high-cost support, total disbursements remain no greater than the high-cost program would be under current rules.")

framework of the ABC Plan that transport rates for RoR carriers may also be in jeopardy under the Plan's vague IP-IP interconnection language. Under this scheme, declaration of traffic as VoIP and using IP-IP interconnection claims to avoid switched transport could very well drive the rate that can be charged for all other traffic, resulting in transport revenues disappearing. Therefore, the Nebraska Companies reasonably understand that the RLEC Plan, coupled with the ABC Plan, creates a substantial probability that current terminating access revenues will largely disappear over the next five years and all switched access rates will largely disappear soon thereafter without receiving sufficient and predictable replacement revenues.

D. Originating Access Revenues as Well as the Revenues from Toll Services are at Risk.

Neither the ABC Plan nor the RLEC Plan expressly addresses originating access, and there is no proposal to replace lost originating access revenues. Nevertheless, current industry trends that will likely accelerate under the ABC Plan place originating access revenues at risk for the Nebraska Companies because increasing wireline toll rates are driving customers to seek other ways to originate tolls calls, mostly by use of wireless networks. This behavior is currently reducing originating access revenue and comprises yet another prong of the overall financial distress that rural companies are experiencing and that is not adequately addressed by the Industry Plans.

Many small rural companies that offer retail long distance service to their subscribers are forced to raise retail long distance rates in the face of large wholesale rate increases. Rural carriers routinely purchase wholesale long distance service from facilities-based interexchange carriers and resell that service to their customers. A few independent resellers exist, but even these companies typically rely on underlying services from larger companies, such as AT&T or Verizon. Over the past three years, these wholesale resellers have increased their wholesale rates to the Nebraska Companies by anywhere from 100% to 200%. The ability of retail long-distance providers to pass along increased wholesale costs to customers in the form of retail rate increases is limited because of competitive options. For many long-distance providers, margins are already low, if not negative. Not surprisingly, no conditions to curtail wholesale market pricing for originating traffic are included in the Industry Plans.

At the same time, the large carriers are also increasing their own retail rates to rural customers, either by elimination of calling plans or by actual rate increases. Although these large carriers are pricing themselves out of the rural long distance market, any revenue losses are of little concern to them because high long-distance rates drive customers to their wireless affiliates, where that service is available.[188]

In the *Further Inquiry*, the Commission asks several questions regarding originating access. First, the Commission asks whether originating access should be handled in a manner different from terminating access. The ABC Plan specifically does not address originating access because the amount of replacement money from setting the ultimate rate at $.0007 would exceed the universal fund budget set forth by such Plan. Furthermore, the large interexchange carriers presumably anticipated that payment of originating access rates could be reduced by simply raising their wholesale and retail long-distance rates to a level that customers would have an incentive to move to another provider's service, namely wireless.

Originating access still represents a significant share of cost recovery for rural carriers. In 2010, the Nebraska Companies billed $8.4 million of originating access, which represents 45% of their total access revenues. Without replacement of this revenue stream, the financial

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[188] The Nebraska Companies have already seen this behavior. In some parts of Nebraska customers are walking or driving to locations near their houses with good wireless service so that they can originate toll calls on their mobile devices

distress of rural companies will increase, thus making them less capable of servicing existing debt and making the investments required to deploy broadband.

Second, the Commission asks whether the recovery for originating access should take the form of a flat per-customer charge imposed on the incumbent LEC's long distance affiliate.[189] A flat charge per customer for originating access would amount to approximately $10 per customer per month for the Nebraska Companies. The flat monthly charge would place the Nebraska Companies at a severe competitive disadvantage relative to other IXCs that would not pay this charge. Furthermore, not every LEC has a long-distance affiliate, so the Commission's proposal to levy a flat fee on the LEC's long-distance affiliate is impractical. Moreover, if such a fee were levied, then the LEC, if it had a long-distance affiliate, might simply dissolve its affiliate.

Finally, the Commission asks several questions regarding 8YY minutes. Specifically, the Commission asks for the number of minutes that the average customer originates, as well as the 8YY minutes originated by the average customer. The Nebraska Companies estimate that between 20 and 30 percent of originating traffic is to an 8YY number. On a circuit switched network, an IXC should pay to both originate and terminate calls since the IXC does not own the network itself and thus must purchase network functionality from the LEC. As the retail service provider, the interexchange carrier bills the customer with the 8YY number. Callers to an 8YY number use the LEC's network to place their calls; thus, the IXC should pay originating access to the local exchange carrier for the use of its network.

A reciprocal compensation system, in which originating compensation does not exist, is unworkable in an environment of originating 8YY traffic and equal access obligations. 8YY traffic is not reciprocal. One carrier's originating traffic does not terminate on another carrier's

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[189] *Further Inquiry,* at 15.

network. The originating 8YY traffic belongs to the carrier that sold the 8YY number to the customer, but the carrier that sold the 8YY number does not own the network being used. Equal access obligations present a similar situation. IXCs use the LEC's network to originate long-distance calls. Thus, IXCs must pay LECs for that use. As described above, however, IXCs have a means of "self-help" by simply raising retail rates until customers seek other options. If the Commission were to eliminate exchange access in favor of reciprocal compensation arrangements, then the Commission would also have to eliminate 8YY traffic and equal access obligations.

E. The ABC Plan's Reliance on IP Conversion and Commercial Agreements Is Likely to Increase Financial Distress of Rural Companies.

The ABC Plan anticipates, facilitates, and envisions the process of continued erosion of ICC. The plan requires that the Commission "eliminate all rate and other service regulations imposed on price cap incumbent LECs" by July 1, 2016.[190] The ABC Plan also provides that IP-to-IP interconnection will be governed only by commercial agreements.[191] As demonstrated in Section VI of these Comments, significant concerns are raised by the ABC Plan's reliance on commercial agreements versus traditional interconnection requirements (both reciprocal compensation and exchange access structures). As a result, significant questions are raised with respect to the plausibility of the recovery level expectations expressed in the RLEC Plan. The RLEC Plan asserts that switched transport rates are set at interstate levels.[192]Nevertheless, this expectation could easily be the subject of an "end run" by any large carrier simply refusing to pay transport charge or demand rate reductions in commercial negotiations. The Nebraska

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[190] See, ABC Plan, Attachment 1, at 13.

[191] *Id.*, at 10, n.10. The ABC Plan would also have the Commission preempt all state COLR regulations. *Id.*, at 13.

[192] *See,US Telecom Letter,* at3.

Companies submit that tariffed transport rates negotiated by RoR companies are unlikely to be sustained as large carriers will demand all interconnection to be IP-IP and subject to commercial negotiation. This situation creates yet another potential windfall for large companies and adds significantly to the financial stress of rural companies. The problem is particularly acute for rural carriers such as the Nebraska Companies that serve very rural areas of the nation where transport services are so vital because of the vast distances and sparse populations. The Nebraska Companies transport revenues amount to $4.7 million for originating and $5.6 million for terminating access. These revenues are at risk under the ABC Plan.

F. The ABC Plan Ignores Large Company Revenue Streams for Special Access and Tandem/Transit Services.

Although the Industry Plans preemptively reduce terminating end office rates to the historically unprecedented and unreasonable level of $0.0007 per minute, these Plans fail to address other rates that are major revenue producers for the large carriers promoting the ABC Plan and that constitute an increasingly large expense for RLECs to connect their broadband customers to the Internet backbone. Specifically, the ABC Plan fails to address special access rates, as well as transit and tandem rates.[193] Thus, none of these rates are subject to the proposed automatic reductions that the ABC Plan Filing Companies seek to unlawfully impose on other carriers, and thus, presumably, would not be reduced to lower than current interstate levels.[194]

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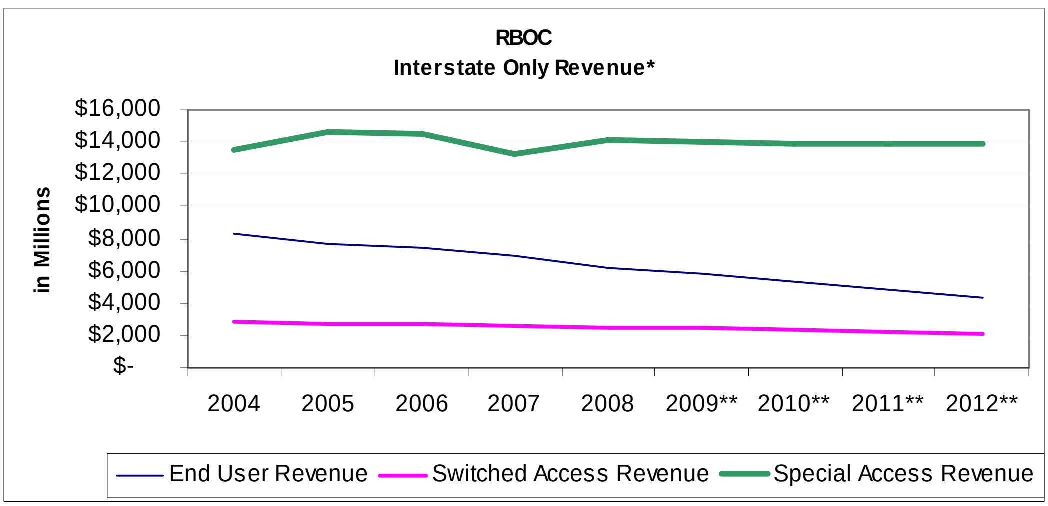
[193] The Nebraska Companies find the ABC Plan's avoidance of rate changes for transit and tandem rates fascinating, especially since the number of minutes of use traversing these facilities is much higher than the number of minutes of use traversing an end office switch. Even assuming that a tandem switch is more costly than an end office switch, the per minute rate should be lower because of the vastly different traffic volumes.

[194] *See*, ABC Plan, Attachment 1, at 11 (tandem and transport payments will not apply to some calls after July 1, 2017).

The Nebraska Companies find the lack of attention in the ABC Plan to these services, and in particular to special access, to be another critical defect in the Plan. With respect to special access the reason is clear – special access revenues continue to be a large, growing revenue stream for price cap companies. The ABC Plan sponsors predictably "wall off" these revenues from any regulatory oversight. An analysis of Regional Bell Operating Companies' interstate special and switched access revenues reported on FCC Form 499-A for the years 2004 through 2008 reveals that special access revenues were seven times more than switched access revenues for the period, as shown in Figure 1.

Figure 1



*Data from FCC Form 499-A found in 2006 - 2010 Monitoring Reports at http://transition.fcc.gov/wcb/iatd/monitor.html.
** Forecasted Data.

After 2008, this data is not available, but it is reasonable to assume that switched revenues will continue to decline and special access revenues are expected to increase, thus making the spread between these two revenue sources even greater. The existence of special access revenues, if properly redirected to deploy rural broadband served by these interstate price cap-regulated companies, would minimize their need for federal universal service.

At the same time, because the ABC Plan does not address special access – thereby impliedly endorsing indefinite continuation of these significant revenue streams that the large companies currently derive from this service – rural and other carriers relying on such services will have to pay more for middle mile and Internet backbone costs as their customers demand higher broadband speeds.[195] These higher costs, in turn, add to the financial stress of rural carriers and reduce their ability to provide broadband service. The Nebraska Companies are not alone in this concern. The Commission raised concerns about special access rates in the CAF NPRM:

> A number of parties have suggested that middle mile costs are a significant component of the costs of serving customers in rural areas. The National Broadband Plan observed that '[i]t is not clear whether the high costs of middle-mile connectivity in rural areas are due solely to long distances and long population density, or also reflect excessively high special access prices as some parties have alleged.'[196]

Due to the large companies' market dominance over special access and the ABC Plan's failure to address the rates for those services, the Nebraska Companies respectfully submit that there can be no basis for adopting the ABC Plan when the failure to address one of the cost drivers for broadband access to the Internet is left unaddressed. At the very least, therefore, the Commission should aggressively pursue a resolution of its open docket on special access rates and should proceed expeditiously to address the concerns expressed by rural carriers and other competitive providers.[197]

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[195] Currently, 29% of Consolidated's costs of providing broadband service is related to transport and backbone charges.

[196] *CAF NPRM* at para. 395.

[197] *See, Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25.

G. The RLEC Plan Proposes an Unknown Reallocation of "Budgeted" (or Capped) Federal Universal Service Amongst RLECs, Creating Additional Uncertainty and Financial Risk.

The federal USF redistribution methodology contained in the RLEC Plan increases the risks for providers such as the Nebraska Companies that serve the nation's most-rural areas, thereby increasing their chances of financial distress and decreasing the chances that broadband build out will continue in the same manner as in the past. If the Commission caps USF (and the RLEC Plan agreed to a "budget" based on existing distributions to rate-of-return LECs), the Nebraska Companies believe that many rural companies across the country truly may not fully understand the mechanics of the RLEC Plan, and particularly do not understand how plan distributions are impacted under a capped USF.[198] Given that the RLEC Plan agreed to a "budget" or cap, these concerns are now a reality were the RLEC Plan to be adopted.

First, the RLEC Plan generally appears to result in a reallocation of federal USF from high-cost to low-cost companies. The RLEC Plan originally mitigated this impact by grandfathering support for carriers that would lose support for a period of five years; however, the negotiated agreement caps support and thus, the mitigation will longer apply. The RLEC Plan reallocates support to the interstate jurisdiction with CAF based on each carrier's broadband "take rate." The greater a company's take rate, the more of its costs will be recovered from federal support up to a 75 percent cap. As a result, RLECs with higher broadband subscribership will recover more of their costs from federal universal service while RLECs with lower subscribership will not. It is reasonable to assume that carriers that operate in lower-cost areas have higher broadband availability and thus have higher penetration levels.

[198]The Nebraska Companies note that the rural trade associations distributed a template for RLECs to use to forecast impacts of the RLEC Plan. The template, however, did not take into account a cap on the size of federal USF. Thus, it is reasonable to assume that results of the template for any individual company will not be accurate.

The original RLEC Plan without a cap had provisions to minimize the losses of companies with lower "take rates." However, the imposition of a cap means that the plan will produce "winners" and "losers" among rural companies. The Nebraska Companies contend that the rules in the RLEC Plan would seem to have similar impacts as the existing cap on High Cost Loop ("HCL") support, which has resulted in many companies not fully recovering costs and thus not earning at the authorized rate of return. This result obviously increases uncertainty and fails to ensure recovery of existing investments that were made under existing rules. Due to this uncertainty, the Nebraska Companies are unable to determine the impact of this provision of the RLEC Plan.

Second, the RLEC Plan purports to support a policy for RLECs to "edge out" their broadband services to unserved areas.[199] However, the details as to how this will occur are, like aspects of the ABC Plan, far too vague to know whether the objective will be met and what the impacts might be. However, since USF is capped to existing levels, and support will be redistributed to some degree to lower-cost carriers, it is plain to see that the rhetoric in the RLEC Plan cannot result in sufficient support for very rural companies to significantly expand broadband availability. Certainly, allowing carriers to "edge out" service without any accountability because insufficient funding is provided to truly high-cost areas is in direct contradiction to the Commission's desire to increase accountability by recipients of support.

H. Subscriber Line Charge Increases Enhance Financial Risk.

The RLEC Plan would allow Subscriber Line Charge ("SLC") increases for RoR companies by $0.75 per line for six years.[200] This increase could apparently occur even where

[199] *See*, Comments of the NECA, NTCA, OPASTCO and WTA ("NECA et. al.") filed Apr. 18, 2011, at 28-38.

[200] *See, US Telecom Letter*, at 3, n.1.

the carrier has already reached the residential rate benchmark level of $25 per month that makes it eligible to receive restructure mechanism support.[201] Thus, companies over that $25 benchmark would be required to increase SLCs each year.

These prospective SLC increases create a series of problems vis-à-vis compliance with Section 254 principles. Increasing the SLC rates to consumers in high-cost areas above the reasonable benchmark level for RoR companies would conflict with the reasonably comparable standard applicable to urban rates, thereby violating Section 254(b)(3). Such high rates would also be strong evidence that support is insufficient in violation of Section 254(d) and that universal service is bearing more than a reasonable share of joint and common costs, in violation of Section 254(k). The RLEC Plan fails to address these issues.

I. If the Industry Plans are Adopted, the Commission would need to Address the Risks that State Funds could be Eliminated.

The Nebraska Companies assert that the preemption of states envisioned in the ABC Plan, and apparently conceded in the RLEC Plan, would very possibly, if not probably, lead to discontinuance of state universal service programs. State universal programs currently support universal voice service and may also support broadband services.[202] The National Broadband

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[201] *Id.* It is unclear whether SLC increases will take place if customers' rates are already at $25. While the Rural Associations maintain that companies do not need to further increase SLC rates once the $25 benchmark is reached, because of the wording in footnote 1 of the *US Telecom Letter*, it can reasonably be concluded that companies at the SLC cap must continue to increase SLC rates even after the $25 benchmark is reached. Without language defining when the SLC increases would take place, as was included in the ABC Plan, it appears that the RLEC Plan will make companies with already high rates increase customer rates further.

[202] The Nebraska Public Service Commission is currently considering to expand the Nebraska Universal Service Fund ("NUSF"), for example, to support broadband services in the state. *See, In the Matter of the Petition of the Nebraska Telecommunications Association for Investigation and Review of Processes and Procedures Regarding the NUSF,* Docket No. NUSF-77, Progression Order No. 3 (June 14, 2011).

Plan notes that there are 21 states distributing $1.5 billion annually.[203]Under the ABC Plan, which is not countered by the RLEC Plan, these state funds face both a legal and motivational threat and an economic threat.

The first threat to state programs is legal and motivational. As demonstrated previously in Section III. F of these Comments, elimination of state funds is certainly contrary to federal policies designed to foster a federal-state partnership for universal service that the Commission has confirmed should be a pillar for its action in this proceeding. If the Industry Plans are adopted, certain parties that are committed to securing deregulation by the states[204] will likely argue that states cannot legally operate universal service fund programs designed to support broadband services.[205]

Equally detrimental to state universal service would be the ABC Plan proposal to preempt state COLR and the "duty to serve" obligations unless the states explicitly fund those obligations and the carriers agree to accept the obligations in exchange for funding.[206] The purported offer included in the ABC Plan that states could still impose COLR obligations if states fund such obligations is, from a practical perspective, no offer at all. The proposal is to require states to begin paying companies to perform what those companies have already been performing for decades under existing franchise obligations. The probable effect of such

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[203] Federal Communications Commission, *Connecting America: The National Broadband Plan*, 144-45, (rel. Mar. 16, 2010).

[204] It is widely known that AT&T has been pushing for, and in some instances accomplishing, deregulation in state legislatures across the country.

[205]*See, In the Matter of the Petition of the Nebraska Telecommunications Association for Investigation and Review of Processes and Procedures Regarding the NUSF,* Docket No. NUSF-77, Comments of Sprint Nextel (April 19, 2010).

[206]*See,* ABC Plan, Attachment 1, at 13.

unprecedented broad preemption would be widespread state disengagement from universal service activities.

The second threat to state universal service fund programs is financial. The Industry Plans erode state funding bases for state programs. VoIP would be declared an interstate service, and intrastate long-distance revenues would drastically diminish. Without action regarding contributions, the states would be left with an ever-dwindling assessment base with which to advance their universal service fund policies. In response, some states may risk raising state fund surcharge rates possibly to unacceptable levels. Other states may be tempted to cut back on funding in order to manage state fund surcharge rates. Still other states are likely to abandon their universal service fund programs altogether.

Financial pressure will also increase because the Industry Plans fail to recognize early adopter states. Early adopter states like Nebraska receive insufficient recognition in the ABC Plan and the RLEC Plan for their prior rate rebalancing and state universal service contributions. Such early adopter states may discontinue their funds for that reason alone, since the state efforts effectively raise the funding burden of customers in those states higher than customers in other states.

Each of the above threats will increase the likelihood that state funds will be dissolved. For more than a decade, the Nebraska Public Service Commission has funded the NUSF program and has urged the Commission to require other states to do the same, apparently to no avail. For the Nebraska Companies, the elimination of the NUSF would be a serious blow to their ability to continue providing services in rural Nebraska, as NUSF support represents as much as one quarter of total regulated revenues for individual companies.

The Industry Plans' broad preemption proposals, coupled with its shrinkage of the revenue base and its failure to address early adopter state issues, will leave states far less capable of and willing to take an active interest in universal service. For example, the offer included in the ABC Plan that states could still impose COLR obligations is illusory. Even though the adoption of the Industry Plans are wholly inappropriate, if the Industry Plans were to be adopted, state universal service funding bases would be eroded due to, among other factors, the improper declaration of VoIP as all *interstate* traffic (thus diminishing currently reported intrastate revenues drastically), the migration of certain intrastate cost recovery to the federal SLCs (thus minimizing reported intrastate revenues) and the incentive to self-declare connecting arrangements as IP-IP (resulting in the possibility of traffic carried through such arrangements as *interstate* traffic). As a result, the practical (yet improper) effects arising from the Industry Plans would be an ever dwindling base of revenues for assessment to advance any COLR obligations. While the Industry Plans may suggest that they advance the federal-state partnership by fostering and advancing universal service, the practical consequences lead to the opposite result. In short, a likely result of broad preemption would be a loss of interest and ability of states to participate financially in universal service.

In addressing the Industry Plans, the Nebraska Companies respectfully submit that the Commission should reconcile its action of adopting any aspect of the Industry Plans with the risks that state funds would be irreparably harmed. The Nebraska Companies have not identified how that reconciliation can logically occur and neither have (or could) the ABC Plan Filing Companies. Accordingly, if only because of its likely detrimental effect on state universal service fund programs, the public interest would be served by rejecting the Industry Plans.

J. The Industry Plans and Recently Approved NECA Interstate Access Tariffs Unfairly Burden and Further Disadvantage Nebraska Residents By Failing to Recognize Nebraska As an Early Adopter State.

The Nebraska Companies and their customers also will suffer from an "early adopter" inequity under the plans, a situation that has existed for years. In 2000, Nebraska began the process of reducing intrastate access charges and established a state universal service fund. As a result, intrastate access rates are significantly lower than they were at the onset of the NUSF program, and access rates in Nebraska are lower than in similarly situated states. Nebraska customers have replaced much of the lost carrier revenue through rebalanced local service rates and surcharges to the NUSF.

Meanwhile, the National Exchange Carrier Association, Inc. ("NECA") recently filed, and the Commission-approved, interstate access tariffs that resulted in an average 22 percent local switching rate increase and 70 percent increase in tandem switched transport rates for rural companies in Band 2.[207] As a result, interstate rates for the Nebraska Companies are now significantly higher than intrastate rates. This unexpected event affects the Nebraska Companies in a complex way under the Industry Plans. First, Nebraska customers will continue to pay a high surcharge rate to support the NUSF, which replaced revenue lost to intrastate access reform. Second, Nebraska customers will pay surcharges to finance federal replacement funds, but in the first two years of the plan those replacement funds will be directed to other states with high intrastate access rates. Meanwhile, the Nebraska Companies will not receive replacement monies under the Industry Plans since the recent NECA tariff filing resulted in interstate access rates that are higher than intrastate access rates in Nebraska.

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[207] *See,* National Exchange Carrier Association, Inc., Transmittal No. 1314 and supporting documentation, filed June 16, 2011. All of the Nebraska Companies are in Band 2 for transport rates. It is noteworthy that transport rates for carriers in Band 1 were actually reduced by approximately 4 percent in the same filing.

These results do not advance the public interest and actually penalize the State of Nebraska for taking actions to reduced intrastate access rates. Consequently, the Industry Plans unfairly burden early adopter states, an outcome that is counter to encouraging the federal-state partnership on universal service. If no modifications are made to Industry Plans to address this inequity, states with universal service programs, such as Nebraska, will be motivated to consider discontinuing their funds since customers in those states are being financially over-burdened compared to customers in states without funds. Such a result will be devastating to rural customers and to the goal of advancing broadband deployment in rural America.

K. Universal Service Policies that Purposefully Create "Winners" and "Losers" cannot Possibly Serve the Public Interest.

While existing ICC and universal service rules may sometimes create differing impacts upon different entities, such impacts are typically rationally explained. Such is not the case with respect to the Industry Plans, as these Plans create arbitrary winners and losers. The Nebraska Companies know of no rational public policy basis for such result; the proponents of the Industry Plans have provided none. Accordingly, should the Industry Plans be adopted, the Commission would need to explain why these Plans purposefully create carriers that are "winners" and carriers that are "losers" independent of reasonable policy goals.

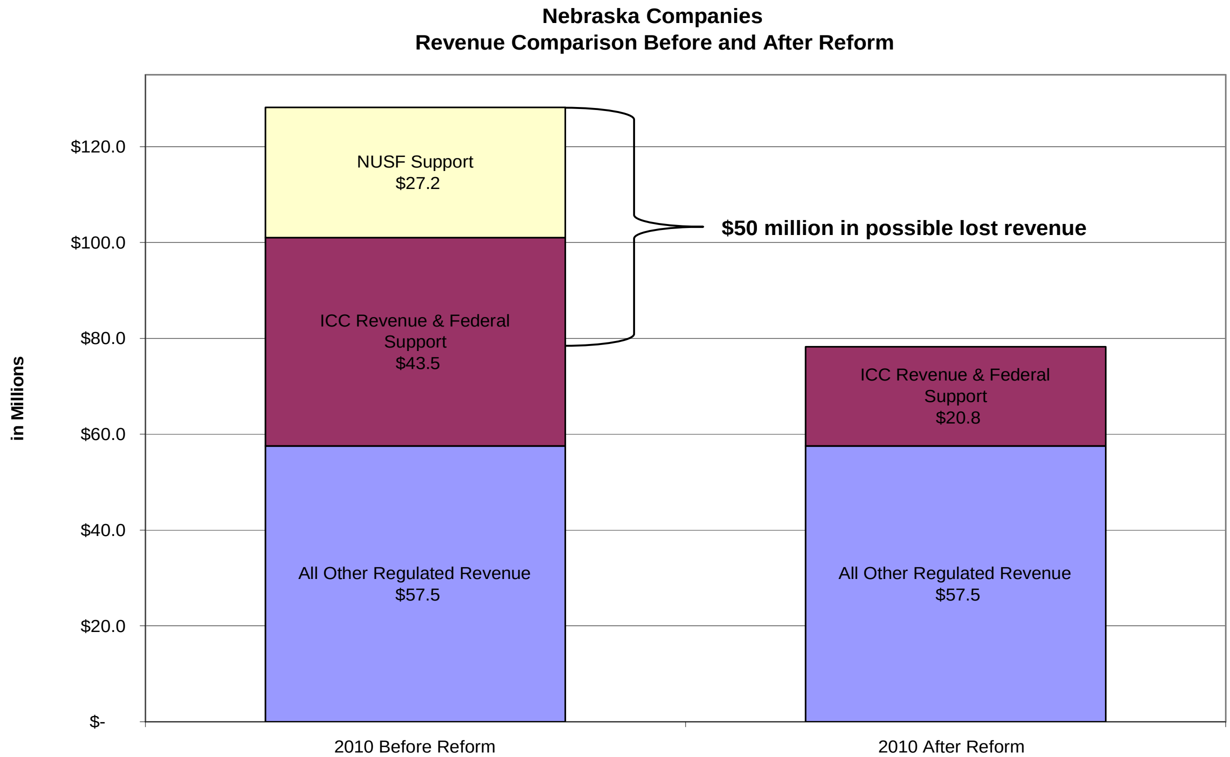
Unquestionably, the Industry Plans will advantage the large and mid-sized companies. For example, the ABC Plan Filing Companies will benefit in at least three ways: (1) as recipients of large overall increases in universal service support under the CQBAT Model, (2) through protection of significant unregulated revenue streams (e.g., special access, tandem and transit services, and wholesale long distance), and (3) by significant decreases in their exchange access expenses arising from the application of the proposed $0.0007 default rate. The ABC Plan provides proposed financial windfalls to the price cap companies while, at the same time, reducing (if not eliminating) their regulatory and public interest universal service obligations under statutorily mandated requirements. Plus, the vague interconnection language provides ample opportunities for these large conglomerates to exercise their market power. No matter whether the market is IP or TDM, the large companies serve as unregulated gatekeepers to reach the rest of the world and stand to profit financially by performing this function. Finally, the ABC Plan is silent on increasing federal universal service contributions, so the "promises" of increased funding to rural carriers may be meaningless.

The financial windfalls contained in the ABC Plan cannot possibly be in the public interest. Stable financing for universal service recipients is necessary, given the large investments that must be undertaken, but the public interest demands that the recipients of such funding assume specific responsibilities and obligations associated with meeting universal service objectives outlined by Congress in Sections 214 and 254, and the objective of further broadband deployment enunciated in the *CAF NPRM*. In light of the financial and regulatory freedom ABC Plan Filing Companies seek, it is questionable whether these Companies will improve universal service and extend broadband to more customers in their rural areas.

At the same time, these Comments have amply demonstrated that the Industry Plans will increase the financial stress on the carriers that actually provide voice and broadband service to the most rural areas of the country. Rather than stanching existing financial losses, the Industry Plans will further erode or eliminate existing ICC revenues that have supplemented universal service payments to make infrastructure investments in higher-cost-to-serve rural areas possible. The near-term impact of the Industry Plans will significantly reduce terminating access charges and possibly eliminate originating access charges. By eliminating intrastate assessment bases and not addressing early adopter issues, these plans will also put state universal service funds at risk. Finally, if the "alternate technology threshold" and the IP interconnection provisions are applied to rural companies, then the Nebraska Companies' difficult financial situation will become even worse.

The following financial impacts of the changes being proposed by the Industry Plans are dramatic. While the Nebraska Companies used their group's combined financial and demand information to calculate the impacts, there is no reason to expect that the effects of the Industry Plans would be less dire for the many other small rural providers across the nation.

In 2010, the Nebraska Companies together collected $128.2 million in total revenue, of which $27.2 million was received from the Nebraska Universal Service Fund, $25.1 million from the federal Universal Service Fund, $18.4 million from intercarrier compensation, and the remaining $57.5 million from other sources such as customers' local charges. As shown in Figure 2 below, the Nebraska Companies could lose $50 million annually as a result of the proposed reforms:



The financial impacts were calculated in a series of steps:

(a) Under the terms of the negotiated Industry Plans, terminating end office rates would decrease to $.0007 per minute. This change would decrease the Nebraska Companies' revenues by $4.3 million annually, or a 23% reduction in intercarrier compensation revenue. Of course, according to the Industry Plan, replacement funding or RM would be available to mitigate this revenue change. Nevertheless, RM funding is not a certainty, especially given the Commission's questions regarding whether recovery funding should be phased out over time and the budgetary limit on RM.[208]

(b) Contained within the ABC Plan is vague interconnection language referring to the use of commercial agreements for IP-IP interconnection. The rate-of-return companies'

[208] *Further Notice*, at 15.

transport revenues, that the Industry Plans purport to leave at interstate rate levels, may not survive a challenge of IP-IP interconnection. Further, TDM transport revenues may become costs in the price cap carriers' vision of interconnection in the IP world. Elimination of terminating transport would be an *additional* annual revenue decrease of $5.6 million, which when combined with the end office rate reductions creates an intercarrier compensation rate decrease of $9.9 million.

(c) The long-term impact of the ABC Plan, as discussed above, puts at risk all originating access. In total, the Nebraska Companies bill $8.4 million in originating access including both interstate and intrastate traffic. If the large long distance carriers exit rural markets, leaving only their 8YY traffic,[209] then rate-of-return companies and their long-distance affiliates would be left financing $6.3 million in lost originating access.

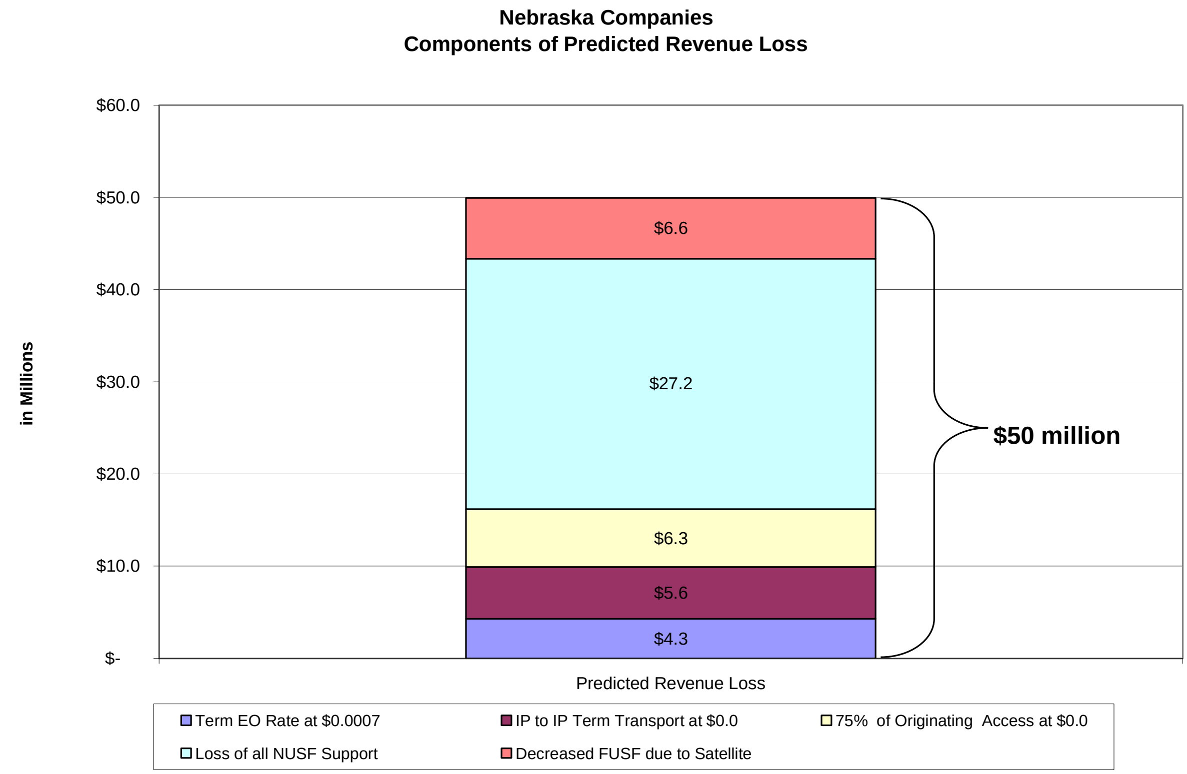
(d) While it is difficult to determine an exact number for loss of state universal service funding resulting from a reduced assessment base, it is reasonable to assume that the entire NUSF would be at risk in Nebraska. Early adopter states like Nebraska receive no recognition in the Industry Plans for their past rate rebalancing and state universal service contributions. Such early adopter states are likely to discontinue their universal service funds because the continued existence of such funds raises the funding burden of customers in those states to levels higher than customers in states without state universal service funds. Currently, the Nebraska Companies receive $27.2 million in Nebraska Universal Service Funding. Assuming that the NUSF

[209] Assuming that 8YY traffic would continue to be paid at existing rates, and further assuming that 8YY traffic represents 25% of the Nebraska Companies originating access minutes.

would be dissolved, the revenue decrease would be $27.2 million, although the distribution of the support is not uniform across all companies.

(e) The Nebraska Companies expect that, were the Commission to implement the "alternate technology threshold" in rate-of-return service areas, 25% of the households in the Nebraska Companies' service areas would be expected to receive satellite instead of terrestrial service. While the "alternate technology threshold" purportedly applies only to price cap locations, the Nebraska Companies are skeptical that this provision could be so narrowly defined. Consequently, the Nebraska Companies estimated the loss in federal USF support of $6.6 million, if support were eliminated for the households above the "alternative technology threshold." Again, the impact of eliminating the customer locations above the "alternative technology threshold" is not uniformly distributed across the Nebraska Companies' customers since each company receives a different amount of federal support and each company serves a different geographic region with varying cost characteristics.

Collectively, the impact of each of these changes is shown in Figure 3 below.



The above estimates do not include the redistribution of rate-of-return universal service payments from high-cost to low-cost companies under the Rural Plan, especially under a fund that is capped. Evaluation of such rate-of-return universal service redistribution is only possible if projections are available from all of the rural companies. The Nebraska Companies have requested that the Rural Associations calculate an impact analysis of capped rate-of-return universal service, but have not yet been provided with the results of such an analysis.

VIII. CONCLUSION.

While the Industry Plans may have been conceived with laudable universal service goals, those goals have not survived. The Commission cannot and should not adopt the Industry Plans as written. At this critical juncture of the economic challenges to this country, the Commission should not run the risk of significantly damaging the rate-of-return companies as small businesses in their service areas. The Industry Plans present this risk and thus should not be adopted. These Comments demonstrate that the Industry Plans will likely increase the current financial stress of the rate-of-return carriers that serve the most rural areas of the country, the very class of carriers that have provided service in areas that the larger companies historically have not served. Accordingly, the Commission should not adopt the Industry Plans but rather should pursue a course that avoids purposefully creating winners and losers, a result far more consistent with fundamental fairness and rational universal service public policy.

For all of the reasons provided in these Comments, the Nebraska Companies respectfully submit that the Commission should not adopt the ABC Plan or the RLEC Plan but rather propose and place out for comment a universal service proposal that incorporates the positions set forth in the foregoing Comments and those previous filings made by the Nebraska Companies in this proceeding. The Nebraska Companies understand the need to modernize the federal USF and ICC system. These needs, however, are not met in the plans currently before the Commission for which the *Further Inquiry* sought comment.

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Respectfully submitted,

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